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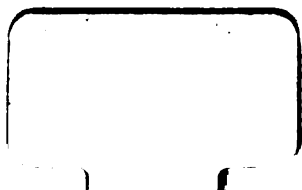
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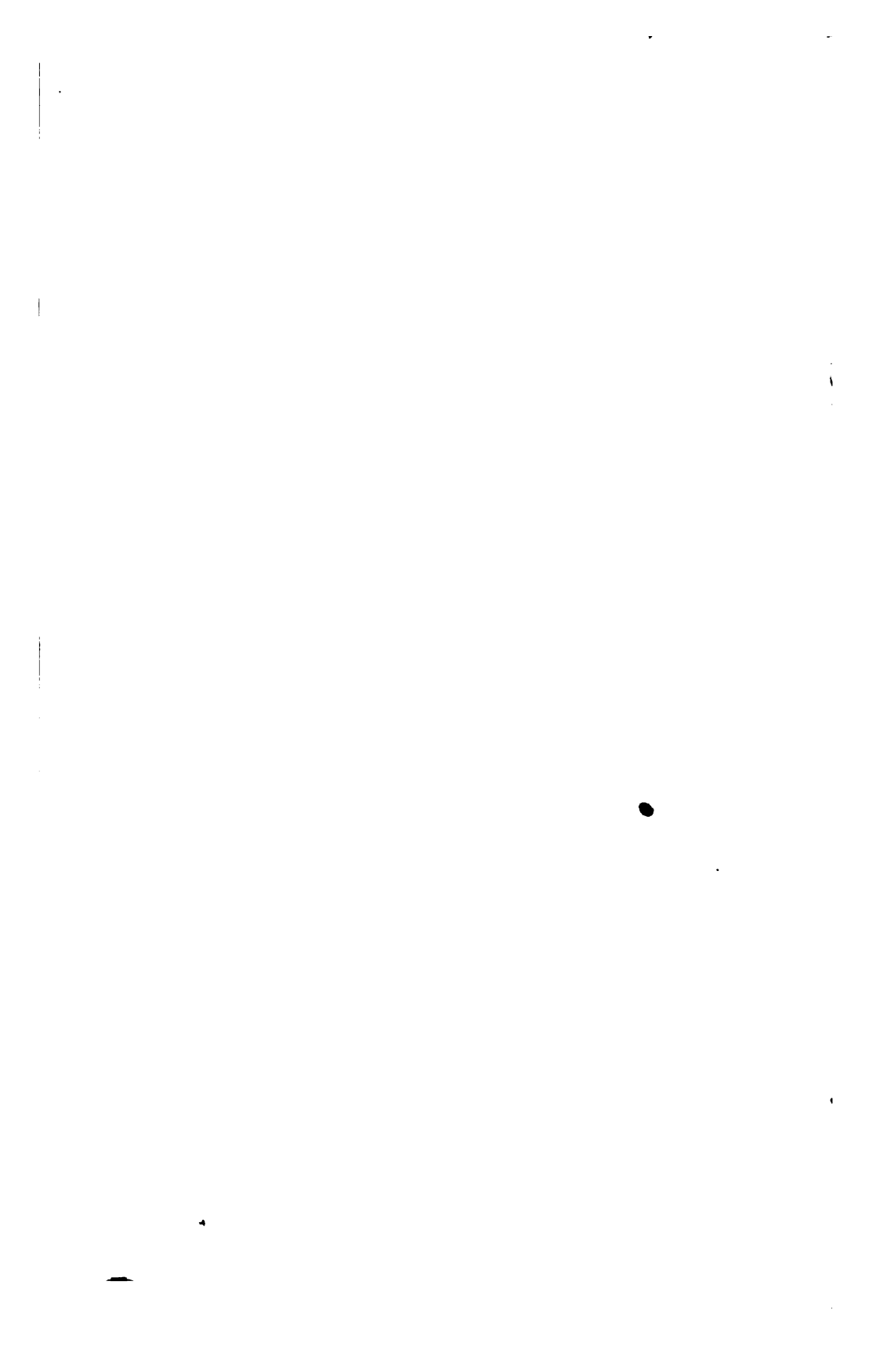
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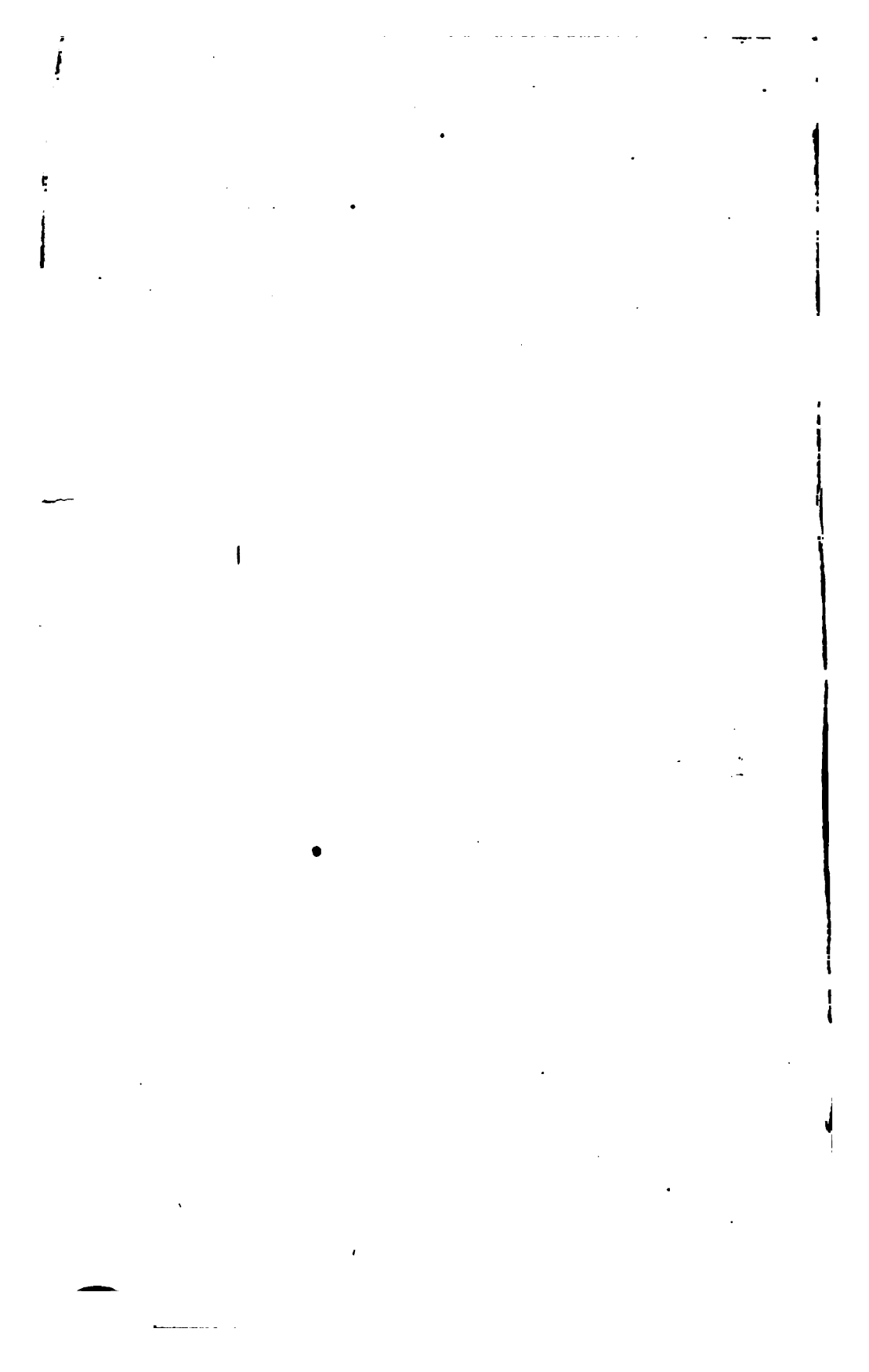
POLITICAL, CIVIL, CIVIL PROCEDURE AND PENAL.

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CIVIL CODE.

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SACRAMENTO:  
D. W. GELWICKS, STATE PRINTER.  
1871.



## PREFACE.

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This, the CIVIL CODE, must, in the main, speak for itself. There is so much urgent labor to be performed by the Commission before the meeting of the Legislature, that a more elaborate exposition must be left to a future occasion. It contains four grand Divisions. These are divided into Parts, Parts into Titles, Titles into chapters, chapters into articles, and the *whole* is sectionized consecutively, from the beginning to the end of the Code. Sections have been left in blank at the end of each chapter and article, for future declaration of rules or amendments.

Our Act adopting the Common Law of England (Stats. 1850, 219) is as follows: "The Common Law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State." The Courts hold that this Act does not mean Common Law of England, but of the United States—"American Common Law;" the Common Law of England, as *modified* by the respective States. There are as many authoritative modifications as there are States in the Union. Rules upon the same subjects differ much in different States. When they so differ, or when they need modifications to suit our conditions, the Court, not the Legislature, establishes the law.

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This "unwritten" law is a system quite complete, but its *expression* is most fragmentary. It is found scattered throughout thousands of volumes of English and American reports and digests, from the Year Books down to the present time. The Civil Law, with Mexican modifications, prevailed in this State up to the time of the adoption of the Common Law. The history of civilization does not furnish a parallel, of placing upon a conquered people a whole system of "unwritten" laws, foreign to them and their language, and which could only be found by searching out its disintegrated elements. The Legislature has never provided for a translation of the Common Law into Spanish. The citizen and the lawyer alike complain over the want of a condensed methodical expression of the law. The Civil Code of New York—a monument of legal wisdom and patient industry—is a collection of Common Law rules and principles, combined with a consolidation of statutes like our own, all concisely stated, logically and harmoniously arranged, in order of subjects corresponding to Blackstone's Commentaries. We "supply the defect" in our Act adopting the Common Law, by specifying the general rules already embraced in its very general terms, and for this purpose avail ourselves of the exhaustive labors of the New York Commission. Most of our statutes have been taken, from time to time, from sister States, and mostly from New York. The chapters on *Special Partnerships* (Stats. 1870, 123) and *Adoption of Children* (Stats. 1870, 530) were taken bodily from the Civil Code of New York.

The sharp lines between statute law and the Common Law, remaining unexpressed in Code form, are toned down. The Code and the Common Law are but harmonious parts of one system, differing only in name—in the terms employed, indicating the different modes of adoption.

The work of revising such of our statutes as pertain to this Code, and giving them conciseness in harmony with the general style of that Code, and of incorporating them in their appro-

## PREFACE.

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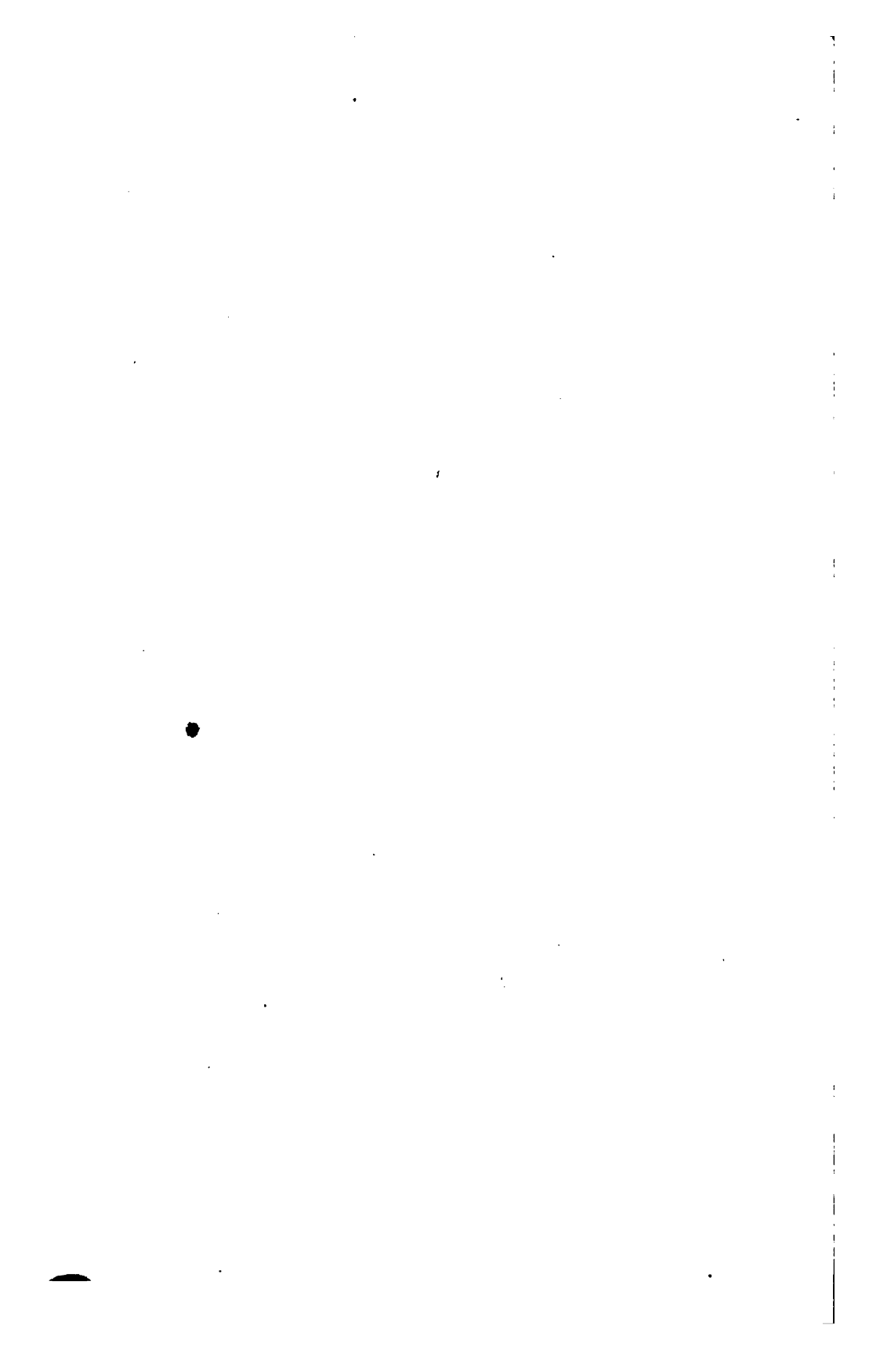
priate places, has been performed with all reasonable care. The law on marriage and divorce has been more fully declared; the distinction between sealed and unsealed instruments has been abolished; married women authorized to convey separate property without the signatures of their husbands; conveyances and acknowledgments simplified, and all parts of the Code made to harmonize with these changes. It is believed that in the main the work is well done. Doubtless some defects or omissions will be discovered on final examination after printing as a whole, which the Commission, Committee or Examining Board will correct before presentation to the Legislature in bill form.

The Code can be considered and be accepted or rejected as a *whole*, or those Acts of our statutes which have been revised and incorporated into the Code can be considered and passed by themselves. The Legislature can take its choice as between the *whole* volume or the revised Titles from the statutes. Alternate bills can be prepared to carry out either plan. Those who choose to follow the Commission through this Code should obtain a copy of the New York Civil Code, as a better means of testing the accuracy of our work. Its numerous references to leading cases, in which the particular principle declared has been adjudicated, and the copious notes, afford the highest guarantee of the correctness of that work.

We make acknowledgments to Judges O. C. Pratt, S. H. Dwinelle, E. D. Sawyer and T. Reed; also, to Messrs. Williams and Thornton, S. Wilson and J. B. Harmon, for examinations and suggestions concerning some portions of the work.

CHARLES LINDLEY,  
JNO. C. BURCH,  
CREED HAYMOND,  
Commissioners.

OFFICE REVISION COMMISSION,  
Sacramento, October 2d, 1871.



# ANALYSIS OF THE CONTENTS.

---

## GENERAL DEFINITIONS AND DIVISIONS.

SECTION	1. Title of Code.....	1
	2. When to take effect.....	2
	3. Definition of law.....	2
	4. Action of sovereign power.....	2
	5. The common law the rule of decision.....	2
	6. Two kinds of common law.....	3
	7. No common law, where the law is declared by this Code.....	3
	8. Two kinds of civil rights.....	3
	9. Rights, how modified.....	3
	10. Divisions of this Code.....	3

---

## DIVISION FIRST.

### PERSONS.

#### PART I. PERSONS.

##### II. PERSONAL RIGHTS.

##### III. PERSONAL RELATIONS.

##### IV. CORPORATIONS.

---

### PART I.

#### PERSONS.

SECTION	17. Minors, who are.....	7
	18. Periods of minority, how calculated.....	7
	19. Adults, who are.....	7
	20. Status of minors, how changed.....	8

SECTION 21. Unborn child.....	3
22. Persons made adults by other States, considered as such in this State, when domiciled herein.....	8
23. Minors by the laws of other State or country, how considered in this State.....	8
24. Persons of unsound mind.....	8
25. Custody of minors.....	8
26. Minors cannot give a delegation of power.....	8
27. Cannot hold offices of trust; may of skill.....	8
28. Contracts of minors made; disaffirmed.....	8
29. When minor may disaffirm.....	9
30. Cannot disaffirm contract for necessities.....	9
31. Nor certain obligations.....	9
32. Contracts of persons without understanding.....	9
33. Contracts of other insane persons.....	9
34. Powers of persons whose incapacity has been adjudged.....	9
35. Minors liable for wrongs.....	10
36. Not liable for exemplary damages.....	10
37. Minors may enforce their rights.....	10

## PART II.

### PERSONAL RIGHTS.

SECTION 43. General personal rights.....	11
44. Defamation, what.....	11
45. Libel, what.....	11
46. Slander, what.....	12
47. What communications are privileged.....	13
48. Protection to personal relations.....	13
49. Right to use force.....	13

## PART III.

### PERSONAL RELATIONS.

#### TITLE I. MARRIAGE.

##### II. PARENT AND CHILD.

##### III. GUARDIAN AND WARD.

##### IV. MASTER AND SERVANT.

## TITLE I.

### MARRIAGE.

#### CHAPTER I. THE CONTRACT OF MARRIAGE.

##### II. DIVORCE.

##### III. HUSBAND AND WIFE.



# CONTENTS.

ix

## CHAPTER I.

### THE CONTRACT OF MARRIAGE.

#### ARTICLE I. VALIDITY OF MARRIAGE.

#### II. AUTHENTICATION OF MARRIAGE.

#### ARTICLE I.

##### VALIDITY OF MARRIAGE.

SECTION 55. What constitutes marriage .....	16
56. Minors capable of contracting marriage .....	16
57. Marriage, how manifested and proved....	17
58. When void.....	18
59. Incompetency of parties to.....	18
60. Of whites and negroes or mulattoes, void.....	18
61. Polygamy forbidden. ....	18
62. Pardon does not restore marital rights.....	18
63. Marriage contracts subject to the same rules as other contracts.....	19
64. Marriage contracted without the State.....	19

#### ARTICLE II.

##### AUTHENTICATION OF MARRIAGE.

SECTION 68. Marriage, how solemnized.....	19
69. Marriage license .....	19
70. By whom solemnized .....	20
71. No particular form of solemnisation.....	20
72. Substantial requisites.....	20
73. Certificate of marriage.....	20
74. Certificate to parties and Recorder.....	20
75. Declaration of marriage, how made .....	21
76. Action to affirm unsolemnized marriages.....	21

## CHAPTER II.

### DIVORCE.

#### ARTICLE I. NULLITY.

#### II. DISSOLUTION.

#### III. CAUSES FOR DENYING DIVORCE.

#### IV. GENERAL PROVISIONS.

#### ARTICLE I.

##### NULLITY.

SECTION 82. Cases where marriage may be annulled.....	22
83. Action to obtain decree of nullity in certain cases, when and by whom commenced.....	23
84. Children of annulled marriage.....	23
85. Custody of children .....	24
86. Effect of judgment of nullity.....	24

# CONTENTS.

## ARTICLE II.

### DISSOLUTION OF MARRIAGE.

SECTION 90. Marriage, how dissolved .....	24
91. Divorce, what.....	24
92. Causes for divorce.....	25
93. Adultery defined.....	25
94. Extreme cruelty, what.....	25
95. Desertion, what.....	25
96. Desertion, how manifested.....	26
97. In case of stratagem or fraud, who commits desertion.....	26
98. In case of cruelty, where one party leaves the other, who commits desertion.....	26
99. Separation by consent not desertion .....	26
100. Intent not to be inferred .....	26
101. Separation and intent to desert not always coincident.....	27
102. Consent to separate revocable.....	27
103. Desertion, how cured. Effect of refusing condonation.....	27
104. Wife must abide by husband's selection of home, or it is desertion on her part.....	27
105. If the place is unfit, and wife refuses to conform, it is desertion by the husband .....	27
106. Wilful neglect, what.....	27
107. Habitual intemperance, what.....	28
108. Felony, what .....	28

## ARTICLE III.

### CAUSES FOR DENYING DIVORCE.

SECTION 112. Divorces denied, on showing what.....	29
113. Connivance, what .....	29
114. Corrupt consent, how manifested.....	29
115. Collusion, what .....	29
116. Condonation, what.....	29
117. Requisites to condonation.....	29
118. Evidence of condonation.....	30
119. Condonation, when operates to bar divorce.....	30
120. Concealment of facts in certain case makes condonation void .....	30
121. Condonation, how revoked .....	30
122. Recrimination, what.....	31
123. Condonation in a recriminatory defence a bar to such defence, when ...	31
124. Divorces denied, when.....	31
125. Lapse of time establishes certain presumptions.....	32
126. Presumptions may be rebutted.....	32
127. Limitation of time .....	32
128. Divorces granted, when.....	32
129. Proof of actual residence required. Presumptions do not apply.....	33
130. Additional rules of practice in divorce cases.....	33
131. Additional affirmative statements required in complaint... ..	34
132. Divorce not to be granted by default, etc. ....	34

## CONTENTS.

xi

### ARTICLE IV.

#### GENERAL PROVISIONS.

Section 136. Relief may be adjudged in some cases, where separation is denied.....	35
137. Expense of action.....	35
138. Orders respecting custody of children.....	35
139. Support of wife and children on divorce or separation granted to wife ...	35
140. Security for maintenance and alimony.....	35
141. Court shall resort to what, in executing certain sections.....	35
142. If wife has sufficient for her support, Court may withhold allowance ...	35
143. Common and separate property may be subjected to support and edu- cate children .....	36
144. When wife shall support husband out of her separate property.....	36
145. Legitimacy of issue .....	36
146. Same.....	36
147. Disposition of common property on divorce.....	36
148. How disposed of when divorce rendered on adultery as a cause.....	37
149. Such an action subject to revision on appeal.....	37

### CHAPTER III.

#### HUSBAND AND WIFE.

Section 155. Mutual obligations of husband and wife.....	38
156. Rights of husband, as head of family.....	38
157. In other respects, their interests separate.....	38
158. Husband and wife may make contracts.....	38
159. How far may impair their legal obligations.....	38
160. Consideration for agreement of separation.....	38
161. May be joint tenants, etc.....	38
162. Separate property of the wife.....	38
163. Separate property of the husband.....	39
164. Common property.....	39
171. Inventory of separate property of wife.....	39
172. Filing inventory, notice of wife's title.....	39
173. Non-entry of property therein prima facie evidence that it is not com- mon property .....	39
174. Earnings of wife not liable for debts of husband.....	40
175. Earnings of wife, when living separate, separate property.....	40
176. Liability for debts of wife contracted before marriage.....	40
177. Wife's property not liable for debts of the husband, but liable for her own debts.....	40
178. Power of the husband over common property .....	40
179. Courtesy and dower not allowed.....	41
180. Neither answerable for the acts of the other.....	41
181. Support of wife.....	41
182. Husband not liable when abandoned by wife.....	41
183. Rights of husband and wife governed by what.....	41
184. Marriage settlement contracts, how executed.....	41
185. To be acknowledged and recorded. ....	41
186. Effect of recording.....	41
187. Minors may make marriage settlements.....	42
188. Rights of married woman as sole trader.....	42

## CONTENTS.

## TITLE II.

## PARENT AND CHILD.

## CHAPTER I. BY BIRTH.

## II. BY ADOPTION.

## CHAPTER I.

## CHILDREN BY BIRTH.

SECTION 193. Legitimacy of children born in wedlock.....	43
194. Legitimacy of children born out of wedlock.....	43
195. Who may dispute the legitimacy of a child.....	43
196. Obligation of parents for the support and education of their children..	43
197. Custody of legitimate child.....	43
198. Husband and wife living separate, neither to have superior right to custody of children.....	43
199. When husband or wife may bring action for the exclusive control of children. Decree in such cases.....	44
200. Custody of an illegitimate child.....	44
201. Allowance to parent.....	44
202. Parent cannot control the property of child.....	44
203. Remedy for parental abuse.....	44
204. When parental authority ceases.....	44
205. Remedy when a parent dies without providing for the support of his child.....	44
206. Reciprocal duties of parents and children in maintaining each other...	45
207. When a parent is liable for necessities supplied to a child.....	45
208. When a parent is not liable for support furnished his child.....	45
209. Husband not bound for the support of his wife's children by a former marriage.....	45
210. Compensation and support of adult child.....	45
211. Parent may relinquish services and custody of child.....	45
212. Wages of minors.....	46
213. Right of parent to determine the residence of child.....	46
214. Parent not liable for acts of child.....	46
215. Wife in certain cases may obtain custody of minor children.....	46

## CHAPTER II.

## ADOPTION.

SECTION 221. Child may be adopted.....	47
222. Who may adopt.....	47
223. Consent of wife necessary ...	47
224. Consent of child's parents.....	47
225. Consent of child.....	48
226. Proceedings on adoption.....	48
227. Judge's order.....	48
228. Effect of adoption.....	48

## CONTENTS.

xiii

Section 229. Effect on former relations of child.....	48
230. Adoption of illegitimate child .....	48

## TITLE III.

### GUARDIAN AND WARD.

Section 236. Guardian, what.....	50
237. Ward, what.....	50
238. Kinds of guardians.....	50
239. General guardian, what.....	50
240. Special guardian, what.....	50
241. Appointment by parent.....	50
242. No person guardian of estate without appointment.....	50
243. Appointment by Court .....	50
244. Same.....	51
245. Jurisdiction .....	51
246. Rules for awarding custody of minor.....	51
247. Powers of guardian appointed by Court.....	51
248. Duties of guardian of the person.....	51
249. Duties of guardian of estate.....	52
250. Relation confidential.....	52
251. Guardian under direction of Court.....	52
252. Death of a joint guardian.....	52
253. Removal of guardian.....	52
254. Guardian appointed by parent, how superseded.....	52
255. Guardian appointed by Court, how superseded.....	53
256. Release by ward.....	53
257. Guardian's discharge.....	53
258. Insane persons.....	53

## TITLE IV.

### MASTER AND SERVANT.

Section 264. Minors may apprentice themselves.....	54
265. Consent of parents, etc., requisite.....	54
266. Written consent.....	55
267. Executors may bind.....	55
268. Supervisors may bind out.....	55
269. Town officers.....	55
270. Age of apprentice to be inserted in indentures.....	55
271. Indentures, conditions in.....	55
272. Same.....	56
273. Deposit of indentures.....	56
274. Alien minors.....	56
275. Contract under preceding section to be acknowledged.....	56
276. Causes for annulling indentures.....	56
277. Proceedings to annul indentures.....	57
278. Service of apprentice, how enforced.....	57

## PART IV.

## CORPORATIONS.

- TITLE I. GENERAL PROVISIONS APPLICABLE TO ALL CORPORATIONS.
- II. INSURANCE CORPORATIONS.
- III. RAILROAD CORPORATIONS.
- IV. STREET RAILROAD CORPORATIONS.
- V. WAGON ROAD CORPORATIONS.
- VI. BRIDGE, FERRY, WHARF, CHUTE AND PIER CORPORATIONS.
- VII. TELEGRAPH CORPORATIONS.
- VIII. WATER AND CANAL CORPORATIONS.
- IX. HOMESTEAD CORPORATIONS.
- X. SAVINGS AND LOAN CORPORATIONS.
- XI. MINING CORPORATIONS.
- XII. RELIGIOUS, SOCIAL AND BENEVOLENT CORPORATIONS.
- XIII. CEMETERY CORPORATIONS.
- XIV. AGRICULTURAL FAIR CORPORATIONS.
- XV. GAS CORPORATIONS.
- XVI. LAND AND BUILDING CORPORATIONS.

## TITLE I.

## GENERAL PROVISIONS APPLICABLE TO ALL CORPORATIONS.

- CHAPTER I. FORMATION OF CORPORATIONS.
- II. CORPORATE STOCK.
- III. CORPORATE POWERS.
- IV. EXTENSION AND DISSOLUTION OF CORPORATIONS.

## CHAPTER I.

## FORMATION OF CORPORATIONS.

- ARTICLE I. CORPORATIONS DEFINED AND HOW ORGANIZED.
- II. BY-LAWS, DIRECTORS, ELECTIONS AND MEETINGS.

## ARTICLE I.

## CORPORATIONS DEFINED AND HOW ORGANIZED.

SECTION 283. Corporation defined.....	60
284. What are public and private corporations.....	60
285. Corporations, how formed.....	60
286. For what purpose private corporations are formed.....	61
287. How corporations may continue their existence under this Code.....	63

## CONTENTS.

xv

Section 288. Must commence to perpetuate, when.....	64
289. Name of instrument creating corporation .....	64
290. Articles of incorporation, what to contain.....	64
291. Certain corporations to state further facts in articles.....	65
292. Pre-requisite to filing articles. Amounts to be subscribed to be fixed...	65
293. Pre-requisite to filing articles of corporations for profit.....	65
294. Oath of officer to subscription of stock and payment of ten per cent...	66
295. Five corporators, three to be citizens of the State, to sign articles and acknowledge the same.....	66
296. To submit articles of insurance corporations to Insurance Commis- sioner.....	66
297. To file articles with County Clerk and Secretary of State, and receive certificate. Term of existence.....	66
298. Certified copy of certificate to be prima facie evidence of its contents...	67

### ARTICLE II.

#### BY-LAWS, DIRECTORS, ELECTIONS AND MEETINGS.

Section 302. Adoption of by-laws—when, how, and by whom.....	68
303. At first meeting of corporation by-laws to be adopted and Directors elected .....	68
304. By-laws to be recorded and how amended.....	68
305. By-laws may be made for certain purposes.....	68
306. How many and who to be Directors. Vacancies in office of Directors and how filled.....	69
307. Election of Directors—how, when, and by whom.....	69
308. Organization of Board.....	70
309. Officers may be removed, how.....	70
310. Justice of the Peace may order meeting.....	70
311. Majority of stock must be represented and a majority vote together, otherwise it is fraudulent .....	71
312. All stock may be represented in votes.....	71
313. Election may be postponed.....	71
314. Complaints and quo warrantos, and proceedings thereon regarding elections.....	71
315. Dividends to be from surplus profits.....	72
316. False certificate, report or notice, to make officers liable.....	72
317. Meeting by consent to be valid.....	73
318. Proceedings at meeting to be binding.....	73

### CHAPTER II.

#### CORPORATE STOCK.

##### ARTICLE I. STOCK AND STOCKHOLDERS.

##### II. ASSESSMENT OF STOCK.

##### ARTICLE I.

##### STOCK AND STOCKHOLDERS.

Section 321. All corporations may call in subscriptions and enforce collections.....	74
322. Liabilities of stockholders. They may be released, when.....	74

SECTION 323. Certificates, how and when issued.....	74
324. Transfer of shares.....	75
325. Transfer of shares held by married women, etc. Dividends payable to married women.....	75
326. Non-resident stockholders. Bonds.....	75
327. Debts not to exceed capital stock.....	76

## ARTICLE II.

## ASSESSMENTS OF STOCK.

SECTION 331. Directors may levy assessments.....	76
332. Limitation. How levied.....	77
333. Majority of Board may order assessments.....	77
334. What order shall contain.....	77
335. Notice of assessment. Form.....	77
336. Publication and service.....	78
337. Delinquent notice. Form.....	78
338. Contents of notice.....	79
339. How published.....	79
340. Jurisdiction acquired, how.....	79
341. Sale to be by public auction.....	79
342. Highest bidder to be the purchaser.....	79
343. In default of bidders, corporation may purchase.....	80
344. Disposition of stock purchased by corporation.....	80
345. Extension of time of delinquent sale.....	80
346. Assessments shall not be invalidated.....	81
347. Action for recovery of stock, and limitation thereof.....	81
348. Affidavits of publication. Affidavits of sale. To be filed.....	81

## CHAPTER III.

## CORPORATE POWERS.

## ARTICLE I. GENERAL POWERS.

## II. LANDS AND RIGHT OF WAY.

## III. RECORDS.

## IV. EXAMINATION OF CORPORATION.

## V. JUDGMENT AGAINST AND SALE OF CORPORATE PROPERTY.

## ARTICLE I.

## GENERAL POWERS.

SECTION 354. Powers of corporations.....	82
355. Limitation of powers.....	83
356. Banking expressly prohibited.....	83
357. Liability of stockholders.....	83
358. Majority to form Board for business.....	83
359. Misnomer does not invalidate instrument.....	83
360. Corporation to organize within one year.....	84
361. Increasing and diminishing capital stock, how.....	84



# CONTENTS.

xvii

## ARTICLE II.

### LANDS AND RIGHT OF WAY.

SECTION 365. Corporations may acquire real estate, and how much.....	85
366. State lands granted for use of corporations.....	86
367. Grant not to embrace town lots.....	86
368. Wood, stone and earth may be taken from State lands.....	86
369. Corporations failing to comply with provisions, to take no grant.....	86
370. Lands to revert to State, when.....	86
371. Selections made, how proved and certified to.....	87
372. County, city and town property, how acquired.....	87
373. Administrators and guardians may convey lands of estates, how.....	87

## ARTICLE III.

### RECORDS.

SECTION 377. Records—of what, and how kept.....	88
378. Other records to be kept by corporations for profit, and others.....	88

## ARTICLE IV.

### EXAMINATION OF CORPORATIONS, ETC.

SECTION 382. Examination into affairs of corporation, how made by officers of State.....	89
383. Examination made by the Legislature.....	89
384. Chapter and article may be repealed.....	89

## ARTICLE V.

### JUDGMENT AGAINST AND SALE OF CORPORATE PROPERTY.

SECTION 388. Franchise may be treated as property, and sold under execution.....	90
389. Purchaser to transact business of corporation.....	90
390. Purchaser may recover penalties, etc.....	90
391. Corporation to retain powers after sale.....	91
392. Redemption of franchise.....	91
393. When proceedings under execution may be had.....	91

## CHAPTER IV.

### EXTENSION AND DISSOLUTION OF CORPORATIONS.

SECTION 399. Proceedings to disincorporate.....	92
400. Receivers and Directors of dissolved corporations.....	92
401. On dissolution, Directors to be Trustees for creditors.....	92
402. Powers of such Trustees.....	92
403. Corporations, how dissolved.....	92
404. Any corporation may extend its corporate existence, how.....	93
405. How corporations may continue their existence.....	93
406. Tit. I to apply to all corporations, with certain exceptions.....	93
407. Definitions.....	93

## TITLE II.

## INSURANCE CORPORATIONS.

## CHAPTER I. GENERAL PROVISIONS.

## II. FIRE AND MARINE INSURANCE CORPORATIONS.

## III. MUTUAL LIFE, HEALTH AND ACCIDENT INSURANCE CORPORATIONS.

## CHAPTER I.

## GENERAL PROVISIONS.

SECTION 413. To comply with requirements of Insurance Commissioner.....	94
414. Subscriptions to capital stock opened, and how collected.....	94
415. Purchase and conveyance of real estate.....	95
416. Policies, how issued and by whom signed.....	95
417. Dividends, of what, and when declared.....	96
418. Directors liable for loss on insurance in certain cases.....	96

## CHAPTER II.

## FIRE AND MARINE INSURANCE CORPORATIONS.

SECTION 423. Capital to be at least one hundred thousand dollars.....	96
424. Payment of subscriptions. Capital to be all paid in twelve months....	97
425. Certificate of capital stock paid up to be filed, and when.....	97
426. Property which may be insured.....	98
427. Funds may be invested, how.....	98
428. Rate of risk.....	98
429. Amounts to be reserved before making dividends.....	98
430. Amounts to be reserved by companies with less than two hundred thousand dollars capital.....	99

## CHAPTER III.

## MUTUAL LIFE, HEALTH AND ACCIDENT INSURANCE CORPORATIONS.

SECTION 437. Capital stock. Guarantee Fund.....	99
438. Of what Guarantee Fund shall consist.....	100
439. What constitutes, and deficiency in fixed capital.....	100
440. Declaration of fixed capital to be filed.....	101
441. Guarantee notes and interest, how disposed of.....	101
442. Insured to be entitled to vote, when.....	102
443. May invest in what securities.....	102
444. Number of Directors may be altered, how.....	102
445. Limitations to the holding of stock and in other particulars may be provided for in by-laws.....	103
446. Premiums, how payable.....	103
447. Corporations to furnish Insurance Commissioner with valuation of policies outstanding, when. How estimated.....	103
448. No stamp required on accident insurance contract.....	104

## CONTENTS.

xix

### TITLE III.

#### RAILROAD CORPORATIONS.

- CHAPTER I. OFFICERS AND CORPORATE STOCK.  
II. ENUMERATION OF POWERS.  
III. BUSINESS, HOW CONDUCTED.

#### CHAPTER I.

##### OFFICERS AND CORPORATE STOCK.

SECTION 453. Directors to be elected, when.....	104
454. Assessments of stock, how made and collected.....	104
455. Additional provisions in assessment and transfer of stock .....	105
456. Corporations may borrow money and issue bonds: Limitation of amount.....	105
457. To provide a Sinking Fund to pay bonds.....	105
458. Capital stock to be fixed.....	106
459. Certificate of payment of fixed capital stock.....	106

#### CHAPTER II.

##### ENUMERATION OF POWERS.

SECTION 465. Enumeration of powers.....	107
1. To survey road.....	107
2. May accept real estate.....	107
3. May acquire real estate.....	107
4. Lay out road, how wide.....	107
5. Where may construct road.....	107
6. May cross or connect roads.....	107
7. May purchase land, timber, stone, gravel, etc.....	108
8. Carry persons and freight.....	108
9. Erect necessary buildings.....	108
10. Regulate time and freights, subject to legislation.....	108
11. Regulate force and speed.....	108
12. Subject to Tit. I of this Part.....	108
466. Map and profile to be filed.....	109
467. May change line of road.....	109
468. Forfeiture of franchise.....	109
469. Crossings and intersections. Condemnation.....	109
470. Not to use streets, alleys or water, in cities or towns, except by a two- third vote of the city or town authorities.....	110
471. Railroads through cities not to charge fare to and from points therein..	110
472. When crossing railroads or highways, how other lands are acquired....	110
473. Corporations may consolidate. Publication of notice. Copy to be filed.	111

## CONTENTS.

## CHAPTER III.

## BUSINESS, HOW CONDUCTED.

SECTION 479. Checks to be affixed to all baggage. Damages.....	111
480. Annual report to be verified. Form of report.....	112
481. Duties of corporation.....	113
482. Corporation to pay damages for refusal.....	113
483. Furnish room inside passenger cars, and be responsible for damages occurring on freight and other cars.....	113
484. Corporations to post printed regulations, and not responsible for dam- ages in violation of rules.....	113
485. To pay damages. Not liable in certain cases. Corporation may re- cover damages, when.....	114
486. Regulations of trains. Penalty.....	114
487. Conductor may eject passengers, when.....	115
488. Officers to wear badge.....	115
489. Rates of charges.....	115
490. Passenger tickets, how issued and to be good for six months.....	116
491. Character of iron to be used.....	116

## TITLE IV.

## STREET RAILROAD CORPORATIONS.

SECTION 497. Authority to lay street railroad track, how obtained.....	117
498. Restrictions and limitations to the grant of the right of way.....	117
499. May make further regulations and rules.....	118
500. Penalty for overcharging.....	119
501. To provide and furnish passenger tickets. Penalty.....	119
502. Trial, proof and limitation.....	119
503. City or town to reserve certain rights.....	119
504. License to be paid to city or town.....	120
505. Track for grading purposes.....	120
506. What provisions of Tit. III are applicable to street railroads.....	120

## TITLE V.

## WAGON ROAD CORPORATIONS.

SECTION 512. Three Commissioners to act with surveyor.....	121
513. Survey and map to be filed, and approved by Supervisors.....	121
514. Tolls, etc., to be collected. Penalty for taking unlawful tolls.....	122
515. No tolls to be charged on highways or public roads.....	122
516. Rates of toll to be posted at gate.....	122
517. Toll-gatherer may detain persons until they pay toll.....	122
518. Toll-gatherer not to detain any person unnecessarily.....	122
519. Persons avoiding tolls to pay five dollars.....	123
520. Penalties for trespasses on property of corporation.....	123
521. When capital invested is repaid, tolls to be reduced, etc.....	123
522. May mortgage and hypothecate corporate property.....	123

## CONTENTS.

xxi

### TITLE VI.

#### BRIDGE, FERRY, WHARF, CHUTE AND PIER CORPORATIONS.

SECTION 528. Corporation to obtain license from Supervisors.....	124
529. In what contingencies corporate existence ceases.....	124
530. President and Secretary to make annual report, and what to contain. Damages for failing to report.....	124

### TITLE VII.

#### TELEGRAPH CORPORATIONS.

SECTION 536. May use right of way along waters, roads and highways.....	126
537. Persons liable for damages for injuring telegraph property.....	126
538. Party guilty of wilful and malicious injury, liable to one hundred times actual damages.....	126
539. Conditions on which damage to sub-aqueous cable may be recovered...	126
540. Duty to send paid dispatch.....	126
541. May dispose of certain rights.....	127
542. Rates of charges to be fixed, and how published.....	127

### TITLE VIII.

#### WATER AND CANAL CORPORATIONS.

SECTION 548. Corporation may obtain contract to supply city or town.....	127
549. Duties of corporation. Rates fixed by Commissioners.....	127
550. Right to use streets, ways, alleys and roads.....	128
551. To build and keep bridges in repair.....	128

### TITLE IX.

#### HOMESTEAD CORPORATIONS.

SECTION 557. Time of corporate existence.....	129
558. By-laws must specify time for and amount of payment of instalments, and penalty for failure to pay. By-laws to be furnished to any member on demand.....	129
559. Advertisement and sale of delinquent and forfeited shares.....	129
560. May borrow and loan funds—how, and for what time.....	130
561. Minor children, wards and married women may own stock.....	130
562. Forfeiture for speculating in or owning lands exceeding two hundred thousand dollars.....	131
563. When corporation is terminated, and how.....	131
564. Payment of premiums.....	131
565. Annual report to be published.....	132

## TITLE X.

## SAVINGS AND LOAN CORPORATIONS.

SECTION 571. May loan money—on what terms, how and to whom, and how long.....	132
572. Capital stock, and rights and privileges thereof.....	133
573. No dividends, except from surplus profits. To contract no liability, except for deposits.....	133
574. Property which may be owned by corporations, and how disposed of. Restrictions in purchases as provided above.....	134
575. Married women and minors may own stock in their own right.....	135
576. May issue transferable certificates of deposit. Special certificates.....	135
577. To provide Reserve Fund for the payment of losses.....	135
578. Prohibition on Director and officer, and what vacates office.....	136

## TITLE XI.

## MINING CORPORATIONS.

SECTION 584. Removal of the principal office provided for.....	137
585. Directors to file certificates of proceedings in offices of County Clerks and Secretary of State.....	137
586. Transfer agencies.....	137
587. Stock issued at transfer agencies.....	137

## TITLE XII.

## RELIGIOUS, SOCIAL AND BENEVOLENT CORPORATIONS.

SECTION 593. Corporations for purposes other than profit, how formed.....	138
594. Additional facts articles of incorporation to set out.....	138
595. Corporation to hold property, and amount of real estate limited.....	139
596. How much land Masons, Odd Fellows and Pioneers may hold.....	139
597. Directors to make verified report annually.....	139
598. Corporations to forfeit franchise and lands. Attorney-General to sue therefor.....	139
599. Corporations may, by order of the District Court, sell or mortgage real estate, when. Petition. Summons or notice. Objections or answer. Trial, order or decree. Court may direct appraisal of property and disposition of proceeds.....	140
600. What may be provided for in their by-laws, etc.....	141
601. Members admitted after incorporation.....	141
602. No member to transfer membership, etc.....	141

## TITLE XIII.

## CEMETERY CORPORATIONS.

SECTION 608. How much land may be held, and how disposed of.....	142
609. Who are members eligible to vote and hold office.....	142

## CONTENTS.

xxiii

SECTION 610. May hold personal property, to what amount. How disposed of.....	143
611. May issue bonds to pay for grounds. Proceeds of sales, how disposed of.....	143
612. May take and hold property or use income thereof, how.....	143
613. Interments in lot, and effect thereof. Transfer of rights only made, how.....	143
614. Lot owners previous to purchase, to be members of the corporation...	144

## TITLE XIV.

### AGRICULTURAL FAIR CORPORATIONS.

SECTION 620. May acquire and hold real estate, how much.....	144
621. Shall not contract debts or liabilities exceeding amount in treasury .....	144
622. Not for profit. May fix fee, etc., for membership.....	145

## TITLE XV.

### GAS CORPORATIONS.

SECTION 628. Corporations to obtain privilege from city or town, and use meters proved by the inspector.....	145
629. Gas to be supplied on written application. Damages for refusal.....	146
630. When corporations may refuse to supply gas.....	146
631. Portions of supply pipes to be laid by the corporation and by appli- cant.....	146
632. Agent of corporation may inspect meters.....	146
633. When persons neglect to pay, gas may be shut off.....	147

## TITLE XVI.

### LAND AND BUILDING CORPORATIONS.

SECTION 639. How organized .....	147
640. May borrow money.....	147
641. Powers and object of the corporation.....	148
642. May insure the lives of members and debtors.....	148
643. What real estate may be owned at any one time.....	148
644. What the by-laws may provide.....	148
645. Secretary must make annual statement, and publish same.....	149
646. Liability of shareholders for debts.....	149
647. Consolidation and transfer of corporation business and property.....	150
648. Married women and minors.....	150

## DIVISION SECOND.

### PROPERTY.

- PART I. PROPERTY IN GENERAL.  
 II. REAL OR IMMOVABLE PROPERTY.  
 III. PERSONAL OR MOVABLE PROPERTY.  
 IV. ACQUISITION OF PROPERTY.

### PART I.

#### PROPERTY IN GENERAL.

- TITLE I. NATURE OF PROPERTY.  
 II. OWNERSHIP.  
 III. GENERAL DEFINITIONS.

### TITLE I.

#### NATURE OF PROPERTY.

SECTION 654. Property, what.....	155
655. In what property may exist.....	155
656. Wild animals.....	155
657. Real and personal.....	156
658. Real property.....	156
659. Land.....	156
660. Fixtures.....	156
661. Appurtenances.....	156
662. Property in mines.....	157
663. Personal property.....	157

### TITLE II.

#### OWNERSHIP.

- CHAPTER I. OWNERS.  
 II. MODIFICATIONS OF OWNERSHIP.  
 III. RIGHTS OF OWNERS.  
 IV. TERMINATION OF OWNERSHIP.



## CONTENTS.

xxv

### CHAPTER I.

#### OWNERS.

SECTION 669. Owner.....	157
670. Property of the State.....	157
671. Who may own property.....	158
672. Aliens inheriting, must claim within five years.....	158

### CHAPTER II.

#### MODIFICATIONS OF OWNERSHIP.

##### ARTICLE I. INTERESTS IN PROPERTY.

##### II. CONDITIONS OF OWNERSHIP.

##### III. RESTRAINTS UPON ALIENATION.

##### IV. ACCUMULATIONS.

#### ARTICLE I.

##### INTERESTS IN PROPERTY.

SECTION 678. Ownership, absolute or qualified.....	159
679. When absolute.....	159
680. When qualified.....	159
681. Several ownership, what.....	159
682. Ownership of several persons.....	159
683. Joint interest, what.....	159
684. Partnership interest, what.....	160
685. Interest in common, what.....	160
686. What interests are in common.....	160
687. Community property.....	160
688. Interests as to time.....	160
689. Present interest, what.....	160
690. Future interest, what.....	160
691. Perpetual interest, what.....	161
692. Limited interest, what.....	161
693. Kinds of future interests.....	161
694. Vested interests.....	161
695. Contingent interests.....	161
696. Two or more future interests.....	161
697. Certain future interests not to be void.....	161
698. Posthumous children.....	161
699. Qualities of expectant estates.....	161
700. Same.....	162
701. Interests in real property.....	162
702. Same.....	162
703. What future interests are recognized.....	162

#### ARTICLE II.

##### CONDITIONS OF OWNERSHIP.

SECTION 707. Fixing the time of enjoyment.....	162
708. Conditions.....	162

## CONTENTS.

SECTION 709. Certain conditions precedent, void.....	162
710. Conditions restraining marriage, void.....	163
711. Conditions restraining alienation, void.....	163

## ARTICLE III.

## RESTRAINTS UPON ALIENATION.

SECTION 715. How long it may be suspended.....	163
716. Future interests void, which suspend power of alienation.....	163
717. Leases of agricultural land, for over ten years, void.....	163
718. Leases of city lots, for over twenty years, void.....	164

## ARTICLE IV.

## ACCUMULATIONS.

SECTION 722. Dispositions of income.....	164
723. Accumulations, when void.....	164
724. Accumulation of income.....	164
725. Other directions, when void in part.....	164
726. Application of income to support, etc., of minor.....	165

## CHAPTER III.

## RIGHTS OF OWNERS.

SECTION 732. Increase of property.....	165
733. In certain cases who entitled to income of property.....	165

## CHAPTER IV.

## TERMINATION OF OWNERSHIP.

SECTION 739. Future interests, when defeated.....	166
740. Same.....	166
741. Future interests, when not defeated.....	166
742. Same.....	166

## TITLE III.

## GENERAL DEFINITIONS.

SECTION 743. Income, what.....	166
749. Time of creation, what.....	167

## PART II.

### REAL OR IMMOVABLE PROPERTY.

- TITLE I. GENERAL PROVISIONS.
- II. ESTATES IN REAL PROPERTY.
- III. RIGHTS AND OBLIGATIONS OF OWNERS.
- IV. USES AND TRUSTS.
- V. POWERS.

### TITLE I.

#### GENERAL PROVISIONS.

SECTION 755. Real property, how governed.....	169
---	-----

### TITLE II.

#### ESTATES IN REAL PROPERTY.

- CHAPTER I. ESTATES IN GENERAL.
- II. TERMINATION OF ESTATES.
- III. SERVITUDES.

#### CHAPTER I.

##### ESTATES IN GENERAL.

SECTION 761. Enumeration of estates .....	170
762. What estate a fee simple.....	170
763. Conditional fees and estates tail abolished.....	170
764. Certain remainders valid.....	171
765. Freeholds. Chattels real. Chattel interests.....	171
766. Estates for life of a third person, when a freehold, etc.....	171
767. Future estates, what.....	171
768. Reversions .....	171
769. Remainders .....	171
770. Limitations of chattels real.....	171
771. Suspension by trust.....	172
772. Contingent remainder in fee.....	172
773. Remainders, future and contingent estates, how created.....	172
774. Limitation of successive estates for life .....	172
775. Remainder upon estates for life of third person.....	172
776. Same.....	173
777. Contingent remainder on a term of years.....	173
778. Remainder of estates for life.....	173
779. Remainder upon a contingency.....	173
780. Heirs of a tenant for life, when to take as purchasers.....	173
781. Construction of certain remainders.....	173
782. Effect of power of appointment.....	174

## CHAPTER II.

## TERMINATION OF ESTATES.

SECTION 788. Tenancy at will may be terminated by notice.....	174
789. Form and service of notice.....	174
790. Effect of notice.....	174
791. Notice by tenant.....	175
792. Double rent may be collected.....	175
793. Re-entry, when and how to be made.....	175
794. Summary proceedings in certain cases provided for.....	175
795. Notice not necessary before action.....	175

## CHAPTER III.

## SERVITUDES.

SECTION 801. Servitudes attached to land.....	176
802. Servitudes not attached to land.....	176
803. Designation of estates.....	177
804. By whom grantable.....	177
805. By whom held.....	177
806. Extent of servitudes.....	177
807. Apportioning easements.....	177
808. Rights of owner of future estate.....	177
809. Actions by owner and occupant of dominant tenement.....	177
810. Actions by owner of servient tenement.....	177
811. How extinguished.....	178

## TITLE III.

## RIGHTS AND OBLIGATIONS OF OWNERS.

## CHAPTER I. RIGHTS OF OWNERS.

## II. OBLIGATIONS OF OWNERS.

## CHAPTER I.

## RIGHTS OF OWNERS.

## ARTICLE I. INCIDENTS OF OWNERSHIP.

## II. BOUNDARIES.

## ARTICLE I.

## INCIDENTS OF OWNERSHIP.

SECTION 817. Water.....	178
818. Rights of tenant for life.....	179
819. Rights of tenant for years, etc.....	179
820. Same.....	179
821. Rights of grantees of rents and reversion.....	179

## CONTENTS.

xxix

SECTION 822. Rights of lessees and their assignees, etc.....	179
823. Remedy on leases for life.....	180
824. Rent dependent on life.....	180
825. Remedy of reversioners, etc.....	180

### ARTICLE II.

#### BOUNDARIES.

SECTION 829. Rights of owner.....	180
830. Boundaries by water.....	180
831. Boundaries by ways.....	181
832. Lateral and subjacent support.....	181
833. Trees whose trunks are wholly on land of one.....	181
834. Line trees.....	181

### CHAPTER II.

#### OBLIGATIONS OF OWNERS.

SECTION 840. Duties of tenant for life.....	181
841. Monuments and fences.....	181

## TITLE IV.

#### USES AND TRUSTS.

SECTION 847. What uses and trusts may exist.....	182
848. Right to possession of land creates legal ownership..	182
849. Certain trusts unaffected.....	182
850. Trustees of estates for use of another take no interest.....	183
851. Preceding sections qualified.....	183
852. Trust must be in writing.....	183
853. Transfer to one for money paid by another.....	183
854. Rights of creditors.....	183
855. Sec. 853 qualified.....	183
856. Purchasers protected.....	184
857. For what purposes express trusts may be created.....	184
858. Certain devises in trust to be deemed powers.....	184
859. Profits of land liable to creditors in certain cases.....	184
860. Other express trusts to be powers in trust.....	185
861. Creation of certain powers not prohibited.....	185
862. And land, etc., to descend to persons entitled.....	185
863. Trustees of express trusts to have whole estate.....	185
864. Author of trust may devise, etc.....	185
865. Title of grantor of trust property.....	185
866. Interests remaining in grantor of express trust.....	186
867. Powers over trust of party interested.....	186
868. Same.....	186
869. Effect of omitting trust in conveyance.....	186
870. Certain sales, etc., by Trustees, void.....	186
871. When estate of Trustee to cease.....	186

## TITLE V.

## POWERS.

Section 877. What powers exist.....	188
878. Application of this Title.....	188
879. Definition of a power.....	188
880. Terms "author of a power" and "holder of a power" defined.....	188
881. Division of powers.....	188
882. Definition of general powers.....	188
883. Definition of special powers.....	188
884. Beneficial powers.....	189
885. Powers in trust.....	189
886. General powers, when in trust.....	189
887. Special powers, when in trust.....	189
888. Who may create power.....	189
889. To whom power may be given.....	189
890. How created.....	189
891. Reservation of powers in conveyances.....	189
892. When power irrevocable.....	190
893. When power a lien.....	190
894. Power of sale in mortgage.....	190
895. Beneficial powers, etc., transferred by insolvent assignments.....	190
896. Who to execute powers.....	190
897. Married women.....	190
898. Same.....	191
899. How executed.....	191
900. Execution by survivors.....	191
901. Execution of power to dispose by devise.....	191
902. Execution of power to dispose by grant.....	191
903. Directions by author, when disregarded.....	191
904. Same.....	191
905. Nominal conditions.....	192
906. When directions of author to be observed.....	192
907. Consent of third person to execution of power.....	192
908. Same.....	192
909. Omission to recite power.....	192
910. Instruments deemed conveyances.....	192
911. Certain dispositions not void.....	193
912. Computation of term of suspension.....	193
913. What estate may be given.....	193
914. Married women, their authority.....	193
915. Defective execution.....	193
916. Fraud.....	193
917. General and beneficial powers to married women.....	193
918. Estate of owner for life, etc., when changed into a fee.....	193
919. Certain powers create a fee.....	194
920. Same.....	194
921. Effect of power to devise inheritance in certain cases.....	194
922. Power to dispose of fee.....	194
923. Power to revoke.....	194
924. Special and beneficial powers, who may take.....	194

## CONTENTS.

xxxi

<b>SECTION</b> 925. Construction of leasing powers.....	195
926. Power to make leases by owner for life.....	195
927. Release of such power.....	195
928. Mortgages by party having power to lease, etc.....	195
929. Effect thereof.....	195
930. Special and beneficial powers liable to creditors.....	195
931. Future beneficial powers.....	196
932. Trust powers imperative.....	196
933. Effect of right of selection.....	196
934. Construction of certain powers.....	196
935. Same .....	196
936. When Court to execute power.....	196
937. Same .....	196
938. Execution of trust power when compelled by creditors, etc.....	197
939. Defective execution.....	197
940. Application of certain sections.....	197

## PART III.

### PERSONAL OR MOVABLE PROPERTY.

#### TITLE I. PERSONAL PROPERTY IN GENERAL.

#### II. PARTICULAR KINDS OF PERSONAL PROPERTY.

### TITLE I.

#### PERSONAL PROPERTY IN GENERAL.

<b>SECTION</b> 946. By what law governed.....	199
947. Future interests in perishable property, how protected.....	199

### TITLE II.

#### PARTICULAR KINDS OF PERSONAL PROPERTY.

##### CHAPTER I. THINGS IN ACTION.

##### II. SHIPPING.

##### III. PRODUCTS OF THE MIND.

##### IV. OTHER KINDS OF PERSONAL PROPERTY.

#### CHAPTER I.

##### THINGS IN ACTION.

<b>SECTION</b> 953. Things in action defined.....	200
954. Transfer and survivorship .....	200

## CONTENTS.

## CHAPTER II

## SHIPPING.

ARTICLE I. GENERAL PROVISIONS.  
II. RULES OF NAVIGATION.

## ARTICLE I.

## GENERAL PROVISIONS.

SECTION 960. Definition of a ship.....	200
961. Appurtenances and equipments.....	200
962. Foreign and domestic navigation.....	201
963. Foreign and domestic ships distinguished.....	201
964. Several owners.....	201
965. Owner for voyage.....	201
966. Registry, etc.....	201

## ARTICLE II.

## RULES OF NAVIGATION.

SECTION 970. Collisions.....	202
1. Rules as to ships meeting each other.....	202
2. The rule for sailing vessels.....	202
3. Rules for steamers in narrow channels.....	202
4. Same.....	202
5. Rules for steam vessels on different courses.....	202
6. Meeting of steamers.....	203
971. Collision from breach of rules.....	203
972. Breaches of such rules to imply wilful default .....	203
973. Loss, how apportioned.....	203

## CHAPTER III.

## PRODUCTS OF THE MIND.

SECTION 980. How far the subject of ownership.....	208
981. Joint authorship .....	208
982. Transfer .....	208
983. Effect of publication.....	208
984. Subsequent inventor, author, etc.....	208
985. Private writings.....	209

## CHAPTER IV.

## OTHER KINDS OF PERSONAL PROPERTY.

SECTION 991. Trade marks and signs.....	209
992. Good will of business.....	209
993. Same.....	209
994. Title deeds.....	209



## CONTENTS.

xxxiii

### PART IV.

#### ACQUISITION OF PROPERTY.

- TITLE I. MODES IN WHICH PROPERTY MAY BE ACQUIRED.**  
II. OCCUPANCY.  
III. ACCESSION.  
IV. TRANSFER.  
V. HOMESTEADS.  
VI. WILLS.  
VII. SUCCESSION.  
VIII. MINES.

#### TITLE I.

##### MODES IN WHICH PROPERTY MAY BE ACQUIRED.

SECTION 1000. Property, how acquired.....	211
---	-----

#### TITLE II.

##### OCCUPANCY.

SECTION 1006. Simple occupancy.....	211
1007. Prescription.....	212

#### TITLE III.

##### ACCESSION.

- CHAPTER I. TO REAL PROPERTY.  
II. TO PERSONAL PROPERTY.

#### CHAPTER I.

##### ACCESSION TO REAL PROPERTY.

SECTION 1013. Fixtures.....	212
1014. Alluvion.....	212
1015. Sudden removal of bank.....	213
1016. Islands, in navigable streams.....	213
1017. In unnavigable streams.....	213
1018. Islands formed by division of stream.....	213
1019. Abandoned bed of stream.....	213

## CONTENTS.

## CHAPTER II.

## ACCESSION TO PERSONAL PROPERTY.

SECTION 1025. Accession by uniting several things.....	214
1026. Principal part, what.....	214
1027. Same.....	214
1028. Uniting materials and workmanship.....	214
1029. Inseparable materials.....	214
1030. Materials of several owners.....	215
1031. Wilful trespassers.....	215
1032. Owner may elect between the thing and its value.....	215
1033. Wrong-doer liable in damages.....	215

## TITLE IV.

## TRANSFER.

## CHAPTER I. TRANSFER IN GENERAL.

## II. TRANSFER OF REAL PROPERTY.

## III. TRANSFER OF PERSONAL PROPERTY.

## IV. RECORDING TRANSFERS OF REAL PROPERTY.

## V. UNLAWFUL TRANSFERS.

## CHAPTER I.

## TRANSFERS IN GENERAL.

## ARTICLE I. DEFINITION OF TRANSFER.

## II. WHAT MAY BE TRANSFERRED.

## III. MEANS OF TRANSFER.

## IV. INTERPRETATION OF GRANTS.

## V. EFFECT OF TRANSFER.

## ARTICLE I.

## DEFINITION OF TRANSFER.

SECTION 1039. Transfer, what.....	216
1040. Voluntary transfer.....	216

## ARTICLE II.

## WHAT MAY BE TRANSFERRED.

SECTION 1044. What may be transferred.....	217
1045. Possibility.....	217
1046. Right of re-entry can be transferred.....	217
1047. Owner ousted of possession may transfer.....	217

## CONTENTS.

xxxv

### ARTICLE III.

#### MEANS OF TRANSFER.

<b>SECTION</b> 1051. When oral.....	217
1052. Grant, what.....	218
1053. Term "grant" includes what.....	218
1054. Delivery necessary.....	218
1055. Date.....	218
1056. Delivery to grantee is necessarily absolute.....	218
1057. Grant made on condition subsequent.....	218
1058. Instrument to pass an estate on condition precedent only an executory contract.....	218
1059. Delivery in escrow.....	219
1060. Surrendering or cancelling grant does not reconvey.....	219
1061. Constructive delivery.....	219

### ARTICLE I.

#### INTERPRETATION OF GRANTS.

<b>SECTION</b> 1065. Grants, how interpreted.....	220
1066. Construction of instruments.....	220
1067. Limitations, how controlled.....	220
1068. Recitals, when resorted to.....	220
1069. If language ambiguous, what may be considered.....	220
1070. Interpretation against grantor.....	221
1071. Grant, how construed.....	221
1072. Irreconcilable provisions.....	221
1073. Thing granted must be described.....	221
1074. Words "northerly," "southerly," etc., mean what.....	221
1075. Meaning of "heirs" and "issue," in certain remainders.....	221
1076. Words of inheritance unnecessary.....	221
1077. When fee simple title is presumed to pass.....	221
1078. Subsequently acquired title passes by operation of law.....	222

### ARTICLE V.

#### EFFECT OF TRANSFER.

<b>SECTION</b> 1082. What title passes.....	222
1083. What interests affected.....	222
1084. Incidents.....	222
1085. Grant may inure to benefit of stranger.....	222

## CHAPTER II.

### TRANSFER OF REAL PROPERTY.

#### ARTICLE I. MODE OF TRANSFER.

##### II. FORM AND EFFECT OF TRANSFER—CODE COVENANTS.

### ARTICLE I.

#### MODE OF TRANSFER.

<b>SECTION</b> 1091. Requisites for transfer of real property.....	223
1092. Written instruments, what are.....	223

SECTION 1093. Grant by married woman, how acknowledged.....	224
1094. Power of attorney of married woman, how acknowledged.....	224
1095. Attorney in fact, how must execute for principal.....	225
1096. Distinction between sealed and unsealed instruments abolished. Im- port consideration.....	225
1097. Want of consideration, <i>onus probandi</i> , where lies.....	225
1098. Witness to an instrument not necessary to its validity.....	225

## ARTICLE II.

## FORM AND EFFECT OF TRANSFER—CODE COVENANTS.

SECTION 1102. Form of simple grant .....	226
1103. No implied covenants in grants.....	227
1104. Code Covenants, special and general.....	227
1105. Special Code Covenants, what.....	227
1106. General Code Covenants, what.....	227
1107. Form of grant, with Special Code Covenants.....	227
1108. Form of grant, with General Code Covenants.....	228
1109. Construction of Code Covenants.....	228
1110. Covenant "against prior grants made by the grantor," what.....	228
1111. Covenant "against encumbrances imposed or suffered by the grantor," what.....	229
1112. Covenant "of ownership," what.....	229
1113. Covenant "against encumbrances," what.....	230
1114. "Encumbrances" defined.....	230
1115. Grantee not barred from obtaining rescission of grant, or damages for false representations.....	230
1116. Code Covenants personal covenants.....	231
1117. Damages for breach of certain Code Covenants, how determined.....	231
1118. Damages for breach of certain other Code Covenants, how determined.	231
1119. Liabilities on other than Code Covenants depend upon what.....	231
1120. What passes by grant.....	231
1121. A fee simple title presumed, when.....	231
1122. Any title subsequently acquired by grantor passes to grantee, when....	231
1123. Grant, how far conclusive on purchasers.....	232
1124. Conveyances by owner for life or for years.....	232
1125. Title to highway.....	232
1126. Attornment by tenant, when unnecessary. Liabilities of tenant.....	232
1127. Lineal and collateral warranties.....	232
1128. Attornment to a stranger.....	233
1129. What easements pass with property.....	233

## CHAPTER III.

## TRANSFERS OF PERSONAL PROPERTY.

## ARTICLE I. MODE OF TRANSFER.

## II. WHAT OPERATES AS A TRANSFER.

## III. GIFTS.

## CONTENTS

xxxvii

### ARTICLE I.

#### MODE OF TRANSFER.

SECTION 1135. When must be in writing .....	233
1136. Transfer by sale, etc.....	233

### ARTICLE II.

#### WHAT OPERATES AS A TRANSFER.

SECTION 1140. Transfer of title under sale.....	234
1141. Transfer of title under executory agreement for sale.....	234
1142. When buyer acquires better title than seller has.....	234

### ARTICLE III.

#### GIFTS.

SECTION 1146. Gifts defined.....	234
1147. Gift, how made.....	235
1148. Gift not revocable.....	235
1149. Gift in view of death, what.....	235
1150. When gift presumed to be in view of death.....	235
1151. Revocation of gift in view of death.....	235
1152. Effect of will upon gift.....	235
1153. When treated as legacy.....	235

## CHAPTER IV.

### RECORDING TRANSFERS OF REAL PROPERTY.

#### ARTICLE I. WHAT MAY BE RECORDED.

##### II. PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS.

##### III. EFFECT OF RECORDING, OR THE WANT THEREOF.

##### IV. MODE OF RECORDING.

### ARTICLE I.

#### WHAT MAY BE RECORDED.

SECTION 1159. Letters patent may be recorded without acknowledgment. Effect of recording.....	236
1160. What kind of instruments may be recorded.....	236
1161. Instruments evidencing title declared by judgment, recorded.....	236
1162. What shall not be recorded.....	236
1163. Instruments proved by other than subscribing witnesses, when and how recorded.....	237
1164. Instruments executed under power of attorney, when deemed recorded.	237
1165. Powers of attorney, how revoked.....	237

### ARTICLE II.

#### PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS.

SECTION 1169. By whom acknowledgments may be taken in this State.....	238
1170. Same.....	238

SECTION 1171. By whom taken without the State.....	239
1172. By whom taken without the United States.....	239
1173. Deputy can take acknowledgment.....	239
1174. Requisites for acknowledgments.....	240
1175. Officer must indorse certificate.....	240
1176. Form of certificate.....	240
1177. Attorney in fact must exhibit to officer, what.....	240
1178. Form of certificate when acknowledgment is by attorney in fact.....	241
1179. Acknowledgment by married woman.....	241
1180. Form of certificate when acknowledgment is by married woman.....	241
1181. Conveyance by married woman, effect of.....	242
1182. Interpreter may be employed.....	242
1183. Proof of execution, how made.....	242
1184. Witness must be personally known to officer....	242
1185. Witness shall prove, what.....	242
1186. Certificate of officer shall be indorsed thereon, setting forth what.....	243
1187. Handwriting may be proved, when.....	243
1188. Evidence must prove, what.....	244
1189. Certificate of officer.....	244
1190. Officers authorised to do certain things.....	244
1191. Officers must affix their signatures.....	244
1192. When instrument is improperly certified, party may have action to correct error.....	245
1193. In certain cases, parties interested entitled to action in Court to obtain judgment of proof of an instrument for record.....	245
1194. Conveyances heretofore made to be governed by then existing laws...	245
1195. Recording, and as evidence, to be governed by then existing laws....	245
1196. Statutes curing acknowledgments, etc., preserved.....	246

## ARTICLE III.

## EFFECT OF RECORDING.

SECTION 1200. Purchaser for value.....	246
1201. Unrecorded instrument valid between the parties.....	247
1202. Unrecorded instrument, when void.....	247
1203. Priority of record.....	247
1204. Purchase from subsequent grantee without notice of prior unrecorded grant, valid.....	247
1205. When prior and subsequent grant are both recorded, a vendee under the latter takes with notice of the former.....	247
1206. Holder of recorded instrument is presumed bona fide purchaser as against whom.....	247
1207. Actual notice, etc., evidence of bad faith.....	248
1208. Circumstances to rebut presumption.....	248
1209. Unrecorded instruments void as against encumbrances.....	248
1210. Sheriff's grant has relation to encumbrance as muniment of title.....	248
1211. Sheriff's grants and certificates of purchase subject to this article.....	248
1212. Priority of record gives priority of right.....	248
1213. Action in District Court to quiet title in certain cases.....	249

## CONTENTS.

xxxix

### ARTICLE IV.

#### MODE OF RECORDING.

<b>SECTION 1217.</b> In what office.....	250
1218. Instrument, when deemed recorded.....	250
1219. Books of record.....	250
1220. Duties of Recorder.....	250
1221. Transfers of vessels.....	250

### CHAPTER V.

#### UNLAWFUL TRANSFERS.

<b>SECTION 1227.</b> Certain instruments void against purchasers, etc.....	251
1228. Not void against purchaser having notice, unless fraud is mutual...	251
1229. Power to revoke, when deemed executed.....	251
1230. Same.....	251
1231. Other provisions.....	252

### TITLE V.

#### HOMESTEADS.

<b>CHAPTER I.</b> GENERAL PROVISIONS RELATING TO HOMESTEADS.	
II. THE HOMESTEAD OF THE HEAD OF A FAMILY.	
III. THE HOMESTEAD OF A PERSON OTHER THAN THE HEAD OF A FAMILY.	

### CHAPTER I.

#### GENERAL PROVISIONS RELATING TO HOMESTEADS.

<b>SECTION 1237.</b> Homestead, what constitutes, and its exemption.....	252
1238. Homestead, from what property may be taken.....	253
1239. Debts from which homestead is not exempt.....	253
1240. Conveyances, mortgages, etc., how executed, acknowledged and recorded.....	253
1241. Homestead, how abandoned.....	254
1242. Proceedings when homestead is claimed to exceed the amount of exemption .....	254
1243. How property disposed of on report of appraisers.....	254
1244. Fees, when the claimant to pay and when the judgment creditor.....	255
1245. Official duties, how enforced.....	255
1246. Who may acquire homesteads, and of what value.....	255

### CHAPTER II.

#### THE HOMESTEAD OF THE HEAD OF A FAMILY.

<b>SECTION 1252.</b> Homestead declaration, what to contain.....	256
1253. "Head of a family" defined.....	256
1254. Declaration, how executed and recorded, and the title thereby vested...	256

# CONTENTS.

## CHAPTER III.

### THE HOMESTEAD OF A PERSON OTHER THAN THE HEAD OF A FAMILY.

SECTION 1260. Petition to County Judge for homestead, what to contain.....	257
1261. Judge to appoint appraisers, who must make oath.....	258
1262. If property exceeds one thousand dollars in value, what to be done...	258
1263. Return of appraisers, and Judge to grant certificate.....	258
1264. Title to be recorded, where and how.....	259

## TITLE VI.

### WILLS.

#### CHAPTER I. EXECUTION AND REVOCATION OF WILLS.

##### II. INTERPRETATION OF WILLS.

##### III. GENERAL PROVISIONS RELATING TO WILLS.

## CHAPTER I.

### EXECUTION AND REVOCATION OF WILLS.

SECTION 1270. Who may make a will.....	260
1271. Monomaniac incompetent.....	260
1272. Will or part thereof procured by fraud.....	261
1273. Separate property of married women.....	261
1274. What may pass by will.....	261
1275. Who may take by will.....	261
1276. Written will, how to be executed.....	261
1277. Witness to add residence.....	262
1278. Mutual will.....	262
1279. Competency of subscribing witness.....	262
1280. Conditional will.....	262
1281. Gifts to subscribing witnesses void. Creditors competent witnesses...	262
1282. Witness who is a devisee and who would be entitled to share of testa- tor's estate if no will, entitled to share to amount of devise.....	262
1283. Will made out of this State.....	263
1284. Will not duly executed, void.....	263
1285. Subsequent change of domicile.....	263
1286. Republication by codicil.....	263
1287. Nuncupative will, how to be executed .....	263
1288. Requisites of a valid nuncupative will.....	263
1289. Proof of nuncupative wills.....	264
1290. Probate of nuncupative wills.....	264
1291. Written will, how revoked.....	264
1292. Evidence of revocation.....	265
1293. Revocation by obliteration on face of will.....	265
1294. Revocation of duplicate.....	265
1295. Revocation by subsequent will.....	265
1296. Antecedent not revived by revocation of subsequent will .....	265
1297. Revocation by marriage and birth of issue.....	265
1298. Effect of marriage of a man on his will.....	266



## CONTENTS.

xli

<b>Section 1299.</b> Effect of a marriage of a woman on her will.....	266
1300. Contract of sale not a revocation.....	266
1301. Mortgage not a revocation of will.....	266
1302. Conveyance, when not a revocation.....	266
1303. When it is a revocation.....	267
1304. Revocation of codicils.....	267
1305. Afterborn child, unprovided for, to succeed.....	267
1306. Children or issue of children of testator unprovided for by his will....	267
1307. Share of afterborn child, out of what part of estate to be paid.....	267
1308. Advancement during lifetime of testator.....	268
1309. Death of devisee, being relation of testator, in lifetime of testator, leaving lineal descendants.....	268
1310. Devises of land, how construed.....	268
1311. Will to pass rights acquired after the making thereof.....	268

## CHAPTER II.

### INTERPRETATION OF WILLS, AND EFFECT OF VARIOUS PROVISIONS.

<b>Section 1317.</b> Testator's intention to be carried out.....	269
1318. Intention to be ascertained from the will.....	269
1319. Rules of interpretation.....	270
1320. Several instruments are to be taken together.....	270
1321. Harmonizing various parts.....	270
1322. In what case devise not affected.....	270
1323. When ambiguous or doubtful.....	270
1324. Words taken in ordinary sense.....	270
1325. Words to receive an operative construction.....	270
1326. Intestacy to be avoided.....	270
1327. Effect of technical words.....	270
1328. Technical words not necessary.....	271
1329. Certain words not necessary to pass a fee. ....	271
1330. Power to devise, how executed by terms of will.....	271
1331. Devise or bequest of all real or all personal property, or both.....	271
1332. Residuary clause.....	271
1333. Same.....	271
1334. "Heirs," "relatives," "issue," "descendants," etc.....	271
1335. Words of donation and of limitation.....	271
1336. To what time words refer.....	272
1337. Devise or bequest to a class.....	272
1338. When conversion takes effect.....	272
1339. When child born after testator's death takes under will.....	272
1340. Mistakes and omissions.....	272
1341. When devises and bequests vest.....	272
1342. When cannot be divested.....	272
1343. Death of devisee or legatee.....	272
1344. Interests in remainder are not affected.....	273
1345. Conditional devises and bequests.....	273
1346. Condition precedent, what.....	273
1347. Effect of condition precedent.....	273
1348. Conditions precedent, when deemed performed.....	273

SECTION 1349. Conditions subsequent, what .....	273
1350. Devises, etc., take as tenants in common.....	273
1351. Advancements, when adoptions.....	273

## CHAPTER III.

## GENERAL PROVISIONS.

SECTION 1357. Nature and designations of legacies.....	274
1. Specific.....	274
2. Demonstrative.....	274
3. Annuities.....	274
4. Residuary.....	275
5. General.....	275
1358. Order of sale in case of an intestate.....	275
1359. Order of sale in case of a testator.....	275
1360. Legacies, how charged with debts.....	275
1361. Same.....	276
1362. Abatement.....	276
1363. Specific devises and legacies.....	276
1364. Heir's conveyance good, unless will is proved within four years. ....	276
1365. Possession of legatees.....	276
1366. Bequest of interest.....	276
1367. Satisfaction.....	276
1368. Legacies, when due.....	277
1369. Interest.....	277
1370. Construction of these rules.....	277
1371. Executor according to the tenor.....	277
1372. Power to appoint is invalid.....	277
1373. Executor not to act till qualified.....	277
1374. Provisions as to revocations.....	277
1375. Execution and construction of prior wills not affected.....	277
1376. " Wills " include codicils.....	277
1377. The law of what place applies.....	277
1378. Liability of beneficiaries for testator's obligations.....	278

## TITLE VII.

## SUCCESSION.

SECTION 1384. Succession defined.....	278
1385. Who first succeeds to possession of estates not devised, and for what purpose.....	279
1386. Succession to and distribution of property.....	279
1387. Illegitimate children to inherit in certain events.....	281
1388. The mother is successor to illegitimate child.....	282
1389. Degrees of kindred, how computed.....	282
1390. Advancements constitute part of distributive share. ....	282
1391. Advancements, when too much, or not enough.....	282
1392. What are advancements.....	282
1393. Value of advancements, how determined.....	283
1394. When heir advanced to dies before decedent.....	283

## CONTENTS.

xliii

<b>SECTION 1395.</b> Inheritance of husband and wife from each other.....	2
1396. Distribution of the common property in case of death of the wife.....	
1397. Distribution of common property on death of the husband.....	
1398. Inheritance by representation.....	
1399. Aliens may inherit, when and how.....	284
1400. Succession not claimed, Attorney-General to cause to be sold, and proceeds deposited.....	284
1401. When the property and estate escheat to the State.....	285
1402. Property escheated subject to charges as other property. ....	285
1403. Successor liable for decedent's obligations.....	285

## TITLE VIII.

### MINES.

<b>SECTION 1409.</b> Injuring crops or buildings.....	285
1410. Miners to give bonds.....	286
1411. Construction of word "improvements".....	286
1412. After crops are harvested, miners may work.....	286

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## DIVISION THIRD.

### OBLIGATIONS.

#### **PART I. OBLIGATIONS IN GENERAL.**

##### **II. CONTRACTS.**

##### **III. OBLIGATIONS IMPOSED BY LAW.**

##### **IV. OBLIGATIONS ARISING FROM PARTICULAR TRANSACTIONS.**

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## PART I.

### OBLIGATIONS IN GENERAL.

#### **TITLE I. DEFINITION OF OBLIGATIONS.**

##### **II. INTERPRETATION OF OBLIGATIONS.**

##### **III. TRANSFER OF OBLIGATIONS.**

##### **IV. EXTINCTION OF OBLIGATIONS.**

# CONTENTS.

## TITLE I.

### DEFINITION OF OBLIGATIONS.

SECTION 1418. Obligation, what.....	289
1419. How created.....	289

## TITLE II.

### INTERPRETATION OF OBLIGATIONS.

#### CHAPTER I. GENERAL RULES OF INTERPRETATION.

##### II. JOINT OR SEVERAL OBLIGATIONS.

##### III. CONDITIONAL OBLIGATIONS.

##### IV. ALTERNATIVE OBLIGATIONS.

### CHAPTER I.

#### GENERAL RULES OF INTERPRETATION.

SECTION 1423. General rules.....	290
----------------------------------	-----

### CHAPTER II.

#### JOINT OR SEVERAL OBLIGATIONS.

SECTION 1427. Obligations, joint or several, etc.....	290
1428. When joint.....	290
1429. Contribution between joint parties.....	290

### CHAPTER III.

#### CONDITIONAL OBLIGATIONS.

SECTION 1434. Obligation, when conditional .....	291
1435. Conditions, kinds of.....	291
1436. Conditions precedent.....	291
1437. Conditions concurrent.....	291
1438. Condition subsequent.....	291
1439. Performance, etc., of conditions, when essential.....	292
1440. When performance, etc., excused.....	292
1441. Impossible or unlawful conditions void.....	292
1442. Conditions involving forfeiture, how construed.....	292

### CHAPTER IV.

#### ALTERNATIVE OBLIGATIONS.

SECTION 1448. Who has the right of selection.....	292
1449. Right of selection, how lost.....	293

## CONTENTS.

xiv

<b>SECTION 1450.</b> Alternatives indivisible.....	293
1451. Nullity of one or more of alternative obligations.....	293

## TITLE III.

### TRANSFER OF OBLIGATIONS.

<b>SECTION 1457.</b> Burden of obligation, not transferable.....	293
1458. Rights arising out of obligation, transferable.....	294
1459. Non-negotiable instruments may be transferred.....	294
1460. Covenants running with land, what.....	294
1461. What covenants run with land.....	294
1462. Same.....	294
1463. Same.....	295
1464. What covenants run with land when assigns are named.....	295
1465. Who are bound by covenants.....	295
1466. Who are not.....	295
1467. Apportionment of covenants.....	295

## TITLE IV.

### EXTINCTION OF OBLIGATIONS.

#### CHAPTER I. PERFORMANCE.

##### II. OFFER OF PERFORMANCE.

##### III. PREVENTION OF PERFORMANCE OR OFFER.

##### IV. ACCORD AND SATISFACTION.

##### V. NOVATION.

##### VI. RELEASE.

### CHAPTER I.

#### PERFORMANCE.

<b>SECTION 1473.</b> Obligation extinguished by performance.....	296
1474. Performance by one of several joint debtors.....	296
1475. Performance to one of joint creditors.....	296
1476. Effect of directions by creditors.....	296
1477. Partial performance.....	297
1478. Payment, what.....	297
1479. Application of general performance.....	297

### CHAPTER II.

#### OFFER OF PERFORMANCE.

<b>SECTION 1485.</b> Obligation extinguished by offer of performance.....	298
1486. Offer of partial performance.....	299
1487. By whom to be made.....	299
1488. To whom to be made.....	299

# CONTENTS.

SECTION 1489. Where offer may be made.....	299
1490. When offer must be made.....	299
1491. Same.....	299
1492. Compensation after delay in performance.....	299
1493. Offer to be made in good faith.....	300
1494. Conditional offer.....	300
1495. Ability and willingness essential..	300
1496. Production of thing to be delivered, not necessary.....	300
1497. Thing offered, to be kept separate.....	301
1498. Performance of condition precedent.....	301
1499. Written receipts.....	301
1500. Extinction of pecuniary obligation..	301
1501. Objections to mode of offer.....	301
1502. Title to thing offered.....	301
1503. Custody of thing offered.....	302
1504. Effect of offer on accessories of obligation.	302
1505. Creditor's retention of thing which he refuses to accept.....	302

## CHAPTER III.

### PREVENTION OF PERFORMANCE OR OFFER.

SECTION 1511. What excuses performance, etc.....	302
1512. Effect of prevention of performance.....	303
1513. Same.....	303
1514. Same.....	303
1515. Effect of refusal to accept performance before offer.....	303

## CHAPTER IV.

### ACCORD AND SATISFACTION.

SECTION 1521. Accord, what.....	304
1522. Effect of accord.....	304
1523. Satisfaction, what.....	304
1524. Accord of liquidated debt.....	304

## CHAPTER V.

### NOVATION.

SECTION 1530. Novation, what.....	305
1531. Modes of novation.....	305
1532. Consideration for novation presumed, when.....	306
1533. Intent presumed....	306
1534. Completed novation operates, how.....	306
1535. Novation a contract.....	306
1536. Rescission of novation.....	306

## CONTENTS.

xlvii

### CHAPTER VI.

#### RELEASE.

SECTION 1541. Obligation extinguished by release.....	307
1542. Certain claims not affected by general release.....	307
1543. Release of several joint debtors.....	307

## PART II.

### CONTRACTS.

- TITLE I. NATURE OF A CONTRACT.
- II. MANNER OF CREATING CONTRACTS.
- III. INTERPRETATION OF CONTRACTS.
- IV. UNLAWFUL CONTRACTS.
- V. EXTINCTION OF CONTRACTS.

## TITLE I.

### NATURE OF A CONTRACT.

- CHAPTER I. DEFINITION.
- II. PARTIES.
- III. CONSENT.
- IV. OBJECT.
- V. CONSIDERATION.

### CHAPTER I.

#### DEFINITION.

SECTION 1549. Contract, what.....	309
1550. Essential elements of contract.....	309

### CHAPTER II.

#### PARTIES.

SECTION 1556. Who may contract.....	310
1557. Minors, etc.....	310
1558. Identification of parties necessary.....	310
1559. When contract for benefit of third person may be enforced.....	310

CHAPTER III.

CONSENT.

<b>SECTION</b>	1565. Essentials of consent.....	311
	1566. Consent, when voidable.....	311
	1567. Apparent consent, when not free.....	311
	1568. When deemed to have been obtained by fraud, etc.....	311
	1569. Duress, what.....	312
	1570. Menace, what.....	312
	1571. Fraud, actual or constructive.....	312
	1572. Actual fraud, what.....	312
	1573. Constructive fraud.....	313
	1574. Actual fraud a question of fact.....	313
	1575. Undue influence, what.....	313
	1576. Mistake, what.....	314
	1577. Mistake of fact.....	314
	1578. Mistake of law.....	315
	1579. Mistake of foreign laws.....	315
	1580. Mutuality of consent.....	315
	1581. Communication of consent.....	315
	1582. Mode of communicating acceptance of proposal.....	315
	1583. When communication deemed complete.....	316
	1584. Acceptance by performance of conditions.....	316
	1585. Acceptance must be absolute.....	316
	1586. Revocation of proposal.....	316
	1587. Revocation, how made.....	316
	1588. Ratification of contract, void for want of consent.....	317
	1589. Assumption of obligation by acceptance of benefits.....	317

CHAPTER IV.

OBJECT OF A CONTRACT.

<b>SECTION</b>	1595. Object, what.....	317
	1596. Requisites of object.....	317
	1597. Impossibility, what.....	317
	1598. When contract wholly void.....	317
	1599. When contract partially void.....	318

CHAPTER V.

CONSIDERATION.

<b>SECTION</b>	1605. Good consideration, what.....	318
	1606. How far legal or moral obligation is a good consideration.....	318
	1607. Consideration lawful.....	319
	1608. Effect of its illegality.....	319
	1609. Consideration executed or executory.....	319
	1610. Executory consideration.....	319
	1611. How ascertained.....	320
	1612. Effect of impossibility of ascertaining consideration.....	320
	1613. Same.....	320



# CONTENTS.

xlix

## TITLE II.

### MANNER OF CREATING CONTRACTS.

<b>SECTION</b> 1619. Contracts express or implied.....	321
1620. Express contract, what.....	321
1621. Implied contract, what.....	321
1622. What contracts may be oral.....	321
1623. Contract not in writing through fraud, may be enforced against fraudulent party.....	321
1624. What contracts must be written.....	321
1625. Effect of writing.....	322
1626. Contract in writing, takes effect when.....	322
1627. Provisions of chapter on transfers of real property.....	322
1628. Corporate seal, how affixed.....	323
1629. Provisions abolishing seals made applicable.....	323

## TITLE III.

### INTERPRETATION OF CONTRACTS.

<b>SECTION</b> 1635. Uniformity of interpretation.....	323
1636. Contracts, how to be interpreted.....	324
1637. Intention of parties, how ascertained.....	324
1638. Intention to be ascertained from language.....	324
1639. Interpretation of written contracts.....	324
1640. Writing, when disregarded.....	324
1641. Effect to be given to every part of contract.....	324
1642. Several contracts, when taken together.....	324
1643. Interpretation in favor of contract.....	325
1644. Words to be understood in usual sense.....	325
1645. Technical words.....	325
1646. Law of place.....	325
1647. Contracts explained by circumstances.....	325
1648. Contract restricted to its evident object.....	325
1649. Interpretation in sense in which promiser believed promisee to rely...	325
1650. Particular clause subordinate to general intent.....	325
1651. Contract, partly written and partly printed.....	326
1652. Repugnancies, how reconciled.....	326
• 1653. Inconsistent words rejected.....	326
1654. Words to be taken most strongly against whom.....	326
1655. Reasonable stipulations, when implied.....	326
1656. Necessary incidents implied.....	326
• 1657. Time of performance of contract.....	327
1658. Time, when of essence.....	327
1659. When joint and several.....	327
1660. Same....	327
1661. Executed and executory contracts, what.....	327

## CONTENTS.

### TITLE IV.

#### UNLAWFUL CONTRACTS.

SECTION 1667. What is unlawful.....	328
1668. Certain contracts unlawful.....	328
1669. Penalties void.....	328
1670. Contract fixing damages, void.....	328
1671. Exception.....	328
1672. Restraints upon legal proceedings.....	329
1673. Contract in restraint of trade, void.....	329
1674. Exception in favor of sale of good will.....	329
1675. Exception in favor of partnership arrangements.....	329
1676. Contract in restraint of marriage, void.....	330

### TITLE V.

#### EXTINCTION OF CONTRACTS.

##### CHAPTER I. CONTRACTS, HOW EXTINGUISHED.

##### II. RESCISSION.

##### III. ALTERATION AND CANCELLATION.

#### CHAPTER I.

##### CONTRACTS, HOW EXTINGUISHED

SECTION 1682. Contract, how extinguished.....	330
---	-----

#### CHAPTER II.

##### RESCISSION.

SECTION 1688. Rescission extinguishes contract.....	331
1689. When party may rescind.....	331
1690. When stipulations against right to rescind do not defeat it.....	331
1691. Rescission, how effected.....	331

#### CHAPTER III.

##### ALTERATION AND CANCELLATION.

SECTION 1697. Alteration by consent.....	332
1698. Sealed contracts, how modified.....	332
1699. Extinction by cancellation, etc.....	332
1700. Extinction by unauthorized alteration.....	333
1701. Alteration of duplicate, not to prejudice.....	333

## PART III.

### OBLIGATIONS IMPOSED BY LAW.

<b>Section 1708.</b> Abstinence from injury.....	<b>335</b>
<b>1709.</b> Fraudulent deceit.....	<b>335</b>
1710. Deceit, what.....	<b>335</b>
1711. Deceit upon the public, etc.....	335
1712. Restoration of thing wrongfully acquired.....	336
1713. When demand necessary.....	336
1714. Responsibility for wilful acts, negligence, etc.....	336
1715. Other obligations.....	336

## PART IV.

### OBLIGATIONS ARISING FROM PARTICULAR TRANSACTIONS.

- TITLE I. SALE.
- II. EXCHANGE.
- III. DEPOSIT.
- IV. LOAN.
- V. HIRING.
- VI. SERVICE.
- VII. CARRIAGE.
- VIII. TRUST.
- IX. AGENCY.
- X. PARTNERSHIP.
- XI. INSURANCE.
- XII. INDEMNITY.
- XIII. GUARANTY.
- XIV. LIEN.
- XV. NEGOTIABLE INSTRUMENTS.
- XVI. GENERAL PROVISIONS.

## TITLE I.

### SALE.

- CHAPTER I. GENERAL PROVISIONS.
- II. RIGHTS AND OBLIGATIONS OF THE SELLER.
- III. RIGHTS AND OBLIGATIONS OF THE BUYER.
- IV. SALE BY AUCTION.

# CONTENTS.

## CHAPTER I.

### GENERAL PROVISIONS.

#### ARTICLE I. SALE.

##### II. AGREEMENTS FOR SALE.

##### III. FORM OF THE CONTRACT.

#### ARTICLE I.

##### SALE.

SECTION 1721. Sale, what.....	338
1722. Subject of sale.....	338

#### ARTICLE II.

##### AGREEMENTS FOR SALE.

SECTION 1726. Agreement for sale.....	338
1727. Agreement to sell.....	338
1728. Agreement to buy.....	338
1729. Agreement to sell and buy.....	339
1730. What may be the subject of the contract.....	339
1731. Agreement to sell real property.....	339
1732. Authority of agent to execute executory contract must be in writing.....	339
1733. Form of grant required by such contract. Code Covenants.....	339
1734. Usual Common Law Covenants required by such contracts, when.....	339
1735. Form of such covenants.....	340

#### ARTICLE III.

##### FORM OF THE CONTRACT.

SECTION 1739. Contract for sale of personal property.....	340
1740. Contract to manufacture.....	341
1741. Contract for sale of real property .....	341

## CHAPTER II.

### RIGHTS AND OBLIGATIONS OF THE SELLER.

#### ARTICLE I. RIGHTS AND DUTIES BEFORE DELIVERY.

##### II. DELIVERY.

##### III. WARRANTY.

#### ARTICLE I.

##### RIGHTS AND DUTIES BEFORE DELIVERY.

SECTION 1748. When seller must act as depositary.....	342
1749. When seller may resell.....	342

## CONTENTS.

iii

### ARTICLE II.

#### DELIVERY.

Section 1753. Delivery on demand.....	342
1754. Delivery, where made .....	342
1755. Expense of transportation.....	342
1756. Notice of election as to delivery.....	343
1757. Buyer's directions as to manner of sending thing sold.....	343
1758. Delivery to be within reasonable hours.....	343
1759. Sale of personal property, when void.....	343

### ARTICLE III.

#### WARRANTY.

Section 1763. Warranty, what.....	344
1764. No implied warranty in mere contract of sale.....	344
1765. Warranty of title to personal property.....	344
1766. Warranty on sale by sample.....	344
1767. When seller knows that buyer relies on his statements, etc.....	344
1768. Merchandise not in existence.....	345
1769. Manufacturer's warranty against latent defects.....	345
1770. Thing bought for particular purpose.....	345
1771. When thing cannot be examined by buyer.....	345
1772. Trade marks.....	346
1773. Other marks.....	346
1774. Warranty on sale of written instrument.....	346
1775. Warranty of provisions for domestic use.....	346
1776. Warranty on sale of good will.....	347
1777. Warranty upon judicial sale.....	347
1778. Effect of general warranty.....	347

## CHAPTER III.

### RIGHTS AND OBLIGATIONS OF THE BUYER.

Section 1784. Price, when to be paid.....	347
1785. Right to inspect goods.....	347
1786. Rights in case of breach of warranty.....	347

## CHAPTER IV.

### SALE BY AUCTION.

Section 1792. Sale by auction, what.....	348
1793. Sale, when complete.....	348
1794. Withdrawal of bid.....	348
1795. Sale under written conditions.....	348
1796. Rights of buyer upon sale without reserve.....	348
1797. By-bidding.....	348
1798. Auctioneer's memorandum of sale.....	349

## TITLE II.

## EXCHANGE.

SECTION 1804. Exchange, what.....	349
1805. Form of contract.....	349
1806. Parties have rights and obligations of sellers and buyers.....	349
1807. Warranty of money.....	350

## TITLE III.

## DEPOSIT.

CHAPTER I. DEPOSIT IN GENERAL.
II. DEPOSIT FOR KEEPING.
III. DEPOSIT FOR EXCHANGE.

## CHAPTER I.

## DEPOSIT IN GENERAL.

ARTICLE I. NATURE AND CREATION OF DEPOSIT.
II. OBLIGATIONS OF THE DEPOSITARY.

## ARTICLE I.

## NATURE AND CREATION OF DEPOSIT.

SECTION 1813. Deposit, kinds of.....	350
1814. Voluntary deposit, how made.....	350
1815. Involuntary deposit, how made.....	350
1816. Same .....	351
1817. Deposit for keeping, what.....	351
1818. Deposit for exchange, what.....	351

## ARTICLE II.

## OBLIGATIONS OF THE DEPOSITARY.

SECTION 1822. Depositary must deliver on demand.....	351
1823. No obligation to deliver without demand.....	351
1824. Place of delivery.....	352
1825. Notice to owner of adverse claim.....	352
1826. Notice to owner of thing wrongfully detained.....	352
1827. Delivery of thing owned jointly, etc.....	352

## CHAPTER II.

## DEPOSIT FOR KEEPING.

ARTICLE I. GENERAL PROVISIONS.
II. GRATUITOUS DEPOSIT.
III. STORAGE.
IV. INNKEEPERS.
V. FINDING.

## CONTENTS.

lv

### ARTICLE I.

#### GENERAL PROVISIONS.

SECTION 1833. Depositor must indemnify depositary.....	353
1834. Obligation of depositary of animals.....	353
1835. Obligations as to use of thing deposited.....	353
1836. Liability for damage arising from wrongful use.....	353
1837. Sale of thing in danger of perishing.....	353
1838. Injury to, or loss of thing deposited.....	354
1839. Service rendered by depositary.....	354
1840. Extent of his liability for negligence.....	354

### ARTICLE II.

#### GRATUITOUS DEPOSIT.

SECTION 1844. Gratuitous deposit, what... ..	354
1845. Nature of involuntary deposit.....	354
1846. Degree of care required of gratuitous depositary.....	354
1847. His duties cease, when .....	354

### ARTICLE III.

#### STORAGE.

SECTION 1851. Deposit for hire.....	355
1852. Degree of care required of depositary for hire.....	355
1853. Rate of compensation for fraction of a week, etc.....	355
1854. Termination of deposit.....	355
1855. Same.....	355

### ARTICLE IV.

#### INNKEEPERS.

SECTION 1859. Innkeeper's liability.....	356
1860. How exempted from liability.....	356

### ARTICLE V.

#### FINDING.

SECTION 1864. Obligation of finder.....	356
1865. Finder to notify owner.....	357
1866. Claimant to prove ownership.....	357
1867. Reward, etc., to finder.....	357
1868. Finder may put thing found on storage.....	357
1869. When finder may sell the thing found.....	357
1870. How sale is to be made .....	357
1871. Surrender of thing to the finder.....	358
1872. Thing abandoned.....	358

## CHAPTER III.

#### DEPOSIT FOR EXCHANGE.

SECTION 1878. Relations of the parties.....	358
---	-----

## TITLE IV.

## LOAN.

- CHAPTER I. LOAN FOR USE.  
 II. LOAN FOR EXCHANGE.  
 III. LOAN OF MONEY.

## CHAPTER I.

## LOAN FOR USE.

SECTION 1884. Loan, what.....	359
1885. Title to property lent.....	359
1886. Care required of borrower.....	359
1887. Same .....	359
1888. Degree of skill.....	359
1889. Borrower, when to repair injuries.....	359
1890. Use of thing lent.....	359
1891. Relending, forbidden.....	359
1892. Borrower, when to bear expenses.....	360
1893. Lender liable for defects.....	360
1894. Lender may require return of thing lent.....	360
1895. When returnable without demand.....	360
1896. Place of return.....	360

## CHAPTER II.

## LOAN FOR EXCHANGE.

SECTION 1902. Loan for exchange, what.....	361
1903. Same .....	361
1904. Title to property lent.....	361
1905. Contract cannot be modified by lender.....	361
1906. Certain sections applicable.....	361

## CHAPTER III.

## LOAN OF MONEY.

SECTION 1912. Loan of money .....	362
1913. Loan to be repaid in current money.....	362
1914. Loan may be for reward.....	362
1915. Interest, what.....	362
1916. Annual rate.....	362
1917. Legal interest.....	362
1918. Same.....	362
1919. Interest becomes part of principal, when.....	363
1920. Interest on judgment.....	363



## CONTENTS.

lvii

### TITLE V.

#### HIRING.

- CHAPTER I. HIRING IN GENERAL.  
II. HIRING OF REAL PROPERTY.  
III. HIRING OF PERSONAL PROPERTY.

#### CHAPTER I.

##### HIRING IN GENERAL.

Section 1925. Hiring, what. ....	363
1926. Products of thing.....	364
1927. Quiet possession.....	364
1928. Degree of care, etc., on part of hirer .....	364
1929. Must repair injuries, etc.....	364
1930. Thing let for a particular purpose.....	364
1931. When letter may terminate the hiring.....	364
1932. When hirer may terminate the hiring.....	364
1933. When hiring terminates.....	365
1934. When terminated by death, etc., of party.....	365
1935. Apportionment of hire.....	365

#### CHAPTER II.

##### HIRING OF REAL PROPERTY.

Section 1941. Lessor to make dwelling house fit for its purpose.....	365
1942. When lessee may make repairs, etc.....	366
1943. Term of hiring when no limit is fixed.....	366
1944. Hiring of lodgings for indefinite term.....	366
1945. Renewal of lease by lessee's continued possession.....	366
1946. Notice to quit.....	366
1947. Rent, when payable.....	367
1948. Tenant must deliver notice served on him.....	367
1949. Letting parts of rooms forbidden.....	367

#### CHAPTER III.

##### HIRING OF PERSONAL PROPERTY.

Section 1955. Obligations of letter of personal property.....	368
1956. Ordinary expenses .....	368
1957. Extraordinary expenses.....	368
1958. Return of thing hired.....	368
1959. Charter party, what.....	368

## TITLE VI.

## SERVICE.

- CHAPTER I. SERVICE WITH EMPLOYMENT.  
 II. PARTICULAR EMPLOYMENTS.  
 III. SERVICE WITHOUT EMPLOYMENT.

## CHAPTER I.

## SERVICE WITH EMPLOYMENT.

- ARTICLE I. DEFINITION OF EMPLOYMENT.  
 II. OBLIGATIONS OF THE EMPLOYER.  
 III. OBLIGATIONS OF THE EMPLOYÉ.  
 IV. TERMINATION OF EMPLOYMENT.

## ARTICLE I.

## DEFINITION OF EMPLOYMENT.

Section 1965. Employment, what. ....	369
--------------------------------------	-----

## ARTICLE II.

## OBLIGATIONS OF THE EMPLOYER.

Section 1969. When employer must indemnify employé.....	369
1970. When not.....	369
1971. Employer to indemnify for his own negligence .....	370

## ARTICLE III.

## OBLIGATIONS OF THE EMPLOYÉ.

Section 1975. Duties of gratuitous employé.....	370
1976. Same.....	370
1977. Same.....	371
1978. Duties of employé for reward.....	371
1979. Duties of employé for his own benefit .....	371
1980. Contracts for service limited to two years.....	371
1981. Employé must obey employer.....	371
1982. Employé to conform to usage.....	372
1983. Degree of skill required.....	372
1984. Must use what skill he has.....	372
1985. What belongs to employer.....	372
1986. Duty to account.....	372
1987. Employé not bound to deliver without demand .....	373
1988. Preference to be given to employers.....	373
1989. Responsibility of employé for substitute.....	373
1990. Responsibility for negligence....	373
1991. Surviving employé.....	373
1992. Confidential employment.....	373

## CONTENTS.

lix

### ARTICLE IV.

#### TERMINATION OF EMPLOYMENT.

Section 1996. Termination by death, etc., of employer.....	374
1997. Employment, how terminated .....	374
1998. Continuance of service in certain cases.....	374
1999. Termination at will .....	374
2000. Termination by employer for fault.....	375
2001. Termination by employé for fault.....	375
2002. Compensation of employé dismissed for cause.....	375
2003. Compensation of employé leaving for cause.....	375

## CHAPTER II.

### PARTICULAR EMPLOYMENTS.

#### ARTICLE I. MASTER AND SERVANT.

##### II. AGENTS.

##### III. FACTORS.

##### IV. SHIPMASTERS.

##### V. MATES AND SEAMEN.

##### VI. SHIPS' MANAGERS.

#### ARTICLE I.

##### MASTER AND SERVANT.

Section 2009. Servant, what.....	376
2010. Term of hiring.....	376
2011. Same.....	376
2012. Renewal of hiring .....	376
2013. Time of service.....	376
2014. Servant to pay over without demand.....	376
2015. When servant may be discharged.....	377

#### ARTICLE II.

##### AGENTS.

Section 2019. Agent to conform to his authority.....	377
2020. Must keep his principal informed.....	377
2021. Collecting agent.....	377
2022. Responsibility of sub-agent.....	377

#### ARTICLE III.

##### FACTORS.

Section 2026. Factor, what.....	378
2027. Obedience required from factor .....	378
2028. Sales on credit .....	378
2029. Liability of factor under guaranty commission.....	378
2030. Factor cannot relieve himself from liability.....	378

# CONTENTS.

## ARTICLE IV.

### SHIPMASTERS.

SECTION 2034.	Appointment of master.....	379
2035.	When must be on board.....	379
2036.	Pilotage.....	379
2037.	Power of master over seamen.....	379
2038.	Power of master over passengers.....	379
2039.	Impressing private stores.....	379
2040.	When may abandon the ship.....	380
2041.	Duties on abandonment.....	380
2042.	When master cannot trade on his own account.....	380
2043.	Care and diligence.....	380
2044.	Authority of master.....	380

## ARTICLE V.

### MATES AND SEAMEN.

SECTION 2048.	Mate, what.....	381
2049.	Seamen, what.....	381
2050.	Mate and seamen, how engaged and discharged.....	381
2051.	Unseaworthy vessel.....	381
2052.	Seamen not to lose wages or lien by agreement.....	381
2053.	Special agreement with seamen.....	381
2054.	Wages depend on freightage.....	382
2055.	When wages, etc., begin.....	382
2056.	Wages, where voyage is broken up before departure.....	382
2057.	Wrongful discharge.....	382
2058.	Wages, when not lost by wreck.....	382
2059.	Certificate.....	382
2060.	Disabled seamen.....	383
2061.	Maintenance of seamen during sickness.....	383
2062.	Death on the voyage.....	383
2063.	Theft, etc., forfeits wages.....	383
2064.	Seamen cannot ship goods.....	383
2065.	Embezzlement and injuries.....	383
2066.	Law governing seamen.....	383

## ARTICLE VI.

### SHIPS' MANAGERS.

SECTION 2070.	Manager, what.....	384
2071.	Duties of manager.....	384
2072.	Compensation.....	384

## CHAPTER III.

### SERVICE WITHOUT EMPLOYMENT.

SECTION 2078.	Voluntary interference with property.....	384
2079.	Salvage.....	385

## CONTENTS.

lxi

### TITLE VII.

#### CARRIAGE.

- CHAPTER I. CARRIAGE IN GENERAL.
- II. CARRIAGE OF PERSONS.
- III. CARRIAGE OF PROPERTY.
- IV. CARRIAGE OF MESSAGES.
- V. COMMON CARRIERS.

#### CHAPTER I.

##### CARRIAGE IN GENERAL.

SECTION 2085. Contract of carriage.....	385
2086. Different kinds of carriers.....	385
2087. Marine and inland carriers, what.....	385
2088. Carriers by sea.....	386
2089. Obligations of gratuitous carriers.....	386
2090. Obligations of gratuitous carrier who has begun to carry.....	386

#### CHAPTER II.

##### CARRIAGE OF PERSONS.

- ARTICLE I. GRATUITOUS CARRIAGE.
- II. CARRIAGE FOR REWARD.

##### ARTICLE I.

###### GRATUITOUS CARRIAGE OF PERSONS.

SECTION 2096. Degree of care required .....	386
---	-----

##### ARTICLE II.

###### CARRIAGE FOR REWARD.

SECTION 2100. General duties of carrier.....	386
2101. Vehicles .....	387
2102. Not to overload his vehicle.....	387
2103. Treatment of passengers.....	387
2104. Rate of speed and delays .....	387

#### CHAPTER III.

##### CARRIAGE AND PROPERTY.

- ARTICLE I. GENERAL DEFINITIONS.
- II. OBLIGATIONS OF THE CARRIER.
- III. BILL OF LADING.
- IV. FREIGHTAGE.
- V. GENERAL AVERAGE.

## CONTENTS.

## ARTICLE I.

## GENERAL DEFINITIONS.

SECTION 2110. Freight, consignor, etc., what.....	387
---	-----

## ARTICLE II.

## OBLIGATIONS OF THE CARRIER.

SECTION 2114. Care and diligence required of carriers.....	388
2115. Carrier to obey directions.....	388
2116. Conflict of orders.....	388
2117. Stowage, deviation, etc.....	388
2118. Delivery of freight .....	389
2119. Place of delivery.....	389
2120. Obligations of carrier when freight is not delivered to consignee.....	389
2121. How carrier may terminate his liability.....	389
2122. When consignee cannot be found.....	389

## ARTICLE III.

## BILL OF LADING.

SECTION 2126. Bill of lading, what.....	390
2127. Bill of lading negotiable.....	390
2128. Same.....	390
2129. Effect of bill of lading on rights, etc., of carrier.....	390
2130. Bills of lading to be given to consignor.....	390
2131. Carrier exonerated by delivery according to bill of lading.....	391
2132. Carrier may demand surrender of bill of lading before delivery.....	391

## ARTICLE IV.

## FREIGHTAGE.

SECTION 2136. When freightage is to be paid.....	391
2137. Consignor, when liable for freightage.....	391
2138. Consignee, when liable.....	392
2139. Natural increase of freight.....	392
2140. Apportionment by contract.....	392
2141. Same.....	392
2142. Apportionment according to distance.....	392
2143. Freight carried further than agreed, etc.....	392
2144. Carrier's lien for freightage.....	392

## ARTICLE V.

## GENERAL AVERAGE.

SECTION 2148. Jettison and general average, what.....	393
2149. Order of jettison.....	393
2150. By whom made.....	393
2151. Loss, how borne.....	393
2152. General average loss, how adjusted.....	393
2153. Values, how ascertained .....	394
2154. Things stowed on deck.....	394
2155. Application of the foregoing rules.....	394

## CONTENTS.

lxiii

### CHAPTER IV.

#### CARRIAGE OF MESSAGES.

SECTION 2161. Obligations of carrier of messages.....	394
2162. Degree of care and diligence required.....	394

### CHAPTER V.

#### COMMON CARRIERS.

- ARTICLE I. COMMON CARRIERS IN GENERAL.
- II. COMMON CARRIERS OF PERSONS.
- III. COMMON CARRIERS OF PROPERTY.
- IV. COMMON CARRIERS OF MESSAGES.

#### ARTICLE I.

##### COMMON CARRIERS IN GENERAL.

SECTION 2168. Common carrier, what.....	395
2169. Obligation to accept freight.....	395
2170. Obligation not to give preference.....	395
2171. What preferences he must give.....	395
2172. Starting .....	395
2173. Compensation.....	396
2174. Obligations of carrier altered only by agreement.....	396
2175. Certain agreements void.....	396
2176. Effect of written contract.....	396

#### ARTICLE II.

##### COMMON CARRIERS OF PERSONS.

SECTION 2180. Obligation to carry luggage.....	397
2181. Luggage, what.....	397
2182. Liability for luggage.....	397
2183. Luggage, how carried and delivered.....	397
2184. Obligation to provide vehicles.....	397
2185. Seats for passengers.....	398
2186. Regulations for conduct of business.....	398
2187. Fare, when payable.....	398
2188. Ejection of passengers.....	398
2189. Fare not payable after ejection.....	398
2190. Carrier's lien.....	398

#### ARTICLE III.

##### COMMON CARRIERS OF PROPERTY.

SECTION 2194. Liability of inland carriers for loss.....	399
2195. When exemptions do not apply.....	399
2196. Liability for delay.....	399
2197. Liability of marine carriers.....	399

# CONTENTS.

SECTION 2198. Same.....	399
2199. Perils of sea, what.....	399
2200. Consignor of valuables to declare their nature.....	399
2201. Delivery of freight beyond usual route.....	400
2202. Proof to be given in case of loss.....	400
2203. Carrier's services, other than carriage and delivery.....	400

## ARTICLE IV.

### COMMON CARRIERS OF MESSAGES.

SECTION 2207. Order of transmission of telegraphic messages.....	400
2208. Order in other cases.....	401
2209. Damages when message is refused or postponed.....	401

# TITLE VIII.

## TRUST.

### CHAPTER I. TRUSTS IN GENERAL.

#### II. TRUSTS FOR THE BENEFIT OF THIRD PERSONS.

## CHAPTER I.

### TRUSTS IN GENERAL.

#### ARTICLE I. NATURE AND CREATION OF A TRUST.

##### II. OBLIGATIONS OF TRUSTEES.

##### III. OBLIGATIONS OF THIRD PERSONS.

## .ARTICLE I.

### NATURE AND CREATION OF A TRUST.

SECTION 2215. Trusts classified.....	402
2216. Voluntary trust, what.....	402
2217. Involuntary trust, what.....	402
2218. Parties to the contract.....	402
2219. What constitutes one a trustee.....	403
2220. For what purpose a trust may be created.....	403
2221. Voluntary trust, how created as to trustor.....	403
2222. How created as to trustee.....	403
2223. Involuntary trustee, who is.....	403
2224. Involuntary trust resulting from negligence, etc.....	404

## ARTICLE II.

### OBLIGATIONS OF TRUSTEES.

SECTION 2228. Trustee's obligation to good faith.....	404
2229. Trustee not to use property for his own profit.....	404
2230. Certain transactions forbidden.....	404
2231. Trustee's influence not to be used for his advantage.....	405
2232. Trustee not to assume a trust adverse to interest of beneficiary.....	405



## CONTENTS.

lxv

<b>SECTION 2233.</b> To disclose adverse interest.....	405
<b>2234.</b> Trustee guilty of fraud, when.....	405
<b>2235.</b> Presumption against trustees.....	405
<b>2236.</b> Trustee mingling trust property with his own.....	405
<b>2237.</b> Measure of liability for breach of trust.....	406
<b>2238.</b> Same.....	406
<b>2239.</b> Co-trustees, how far liable for each other.....	406

### ARTICLE III.

#### OBLIGATIONS OF THIRD PERSONS.

<b>SECTION 2243.</b> Third person, when involuntary trustee.....	406
<b>2244.</b> When third person must see to application of trust property.....	406

## CHAPTER II.

### TRUSTS FOR THE BENEFIT OF THIRD PERSONS.

#### ARTICLE I. NATURE AND CREATION OF THE TRUST.

##### II. OBLIGATIONS OF TRUSTEES.

##### III. POWERS OF TRUSTEES.

##### IV. RIGHTS OF TRUSTEES.

##### V. TERMINATION OF THE TRUST.

##### VI. SUCCESSION OR APPOINTMENT OF NEW TRUSTEES.

### ARTICLE I.

#### NATURE AND CREATION OF THE TRUST.

<b>SECTION 2250.</b> Who are trustees within scope of this chapter.....	407
<b>2251.</b> Creation of trust.....	407
<b>2252.</b> Trustee appointed by Court.....	407
<b>2253.</b> Declaration of trust.....	407
<b>2254.</b> Same.....	407

### ARTICLE II.

#### OBLIGATIONS OF TRUSTEES.

<b>SECTION 2258.</b> Trustees must obey declaration of trust.....	408
<b>2259.</b> Degree of care and diligence in execution of trust.....	408
<b>2260.</b> Duty of trustee as to appointment of successor.....	408
<b>2261.</b> Investment of money by trustee.....	408
<b>2262.</b> Interest, simple or compound, on omission to invest trust moneys.....	409
<b>2263.</b> Purchase by trustee of claims against trust fund.....	409

### ARTICLE III.

#### POWERS OF TRUSTEES.

<b>SECTION 2267.</b> Trustee's powers as agent.....	409
<b>2268.</b> All must act.....	409
<b>2269.</b> Discretionary powers.....	409

## CONTENTS.

## ARTICLE IV.

## RIGHTS OF TRUSTEES.

SECTION 2273. Indemnification of trustee.....	410
2274. Compensation of trustee.....	410
2275. Involuntary trustee. ....	410

## ARTICLE V.

## TERMINATION OF THE TRUST.

SECTION 2279. Trust, how extinguished.....	410
2280. Not revocable.....	410
2281. Trustee's office, how vacated.....	411
2282. Trustee, how discharged.....	411
2283. Removal by District Court.....	411

## ARTICLE VI.

## SUCCESSION OR APPOINTMENT OF NEW TRUSTEES.

SECTION 2287. Vacant trusteeship filled by Court.....	411
2288. Survivorship between co-trustees.....	411
2289. District Court as trustee.....	412

## TITLE IX.

## AGENCY.

## CHAPTER I. AGENCY IN GENERAL.

## II. PARTICULAR AGENCIES.

## CHAPTER I.

## AGENCY IN GENERAL.

## ARTICLE I. DEFINITION OF AGENCY.

## II. AUTHORITY OF AGENTS.

## III. MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

## IV. OBLIGATIONS OF AGENTS TO THIRD PERSONS.

## V. DELEGATION OF AGENCY.

## VI. TERMINATION OF AGENCY.

## ARTICLE I.

## DEFINITION OF AGENCY.

SECTION 2295. Agency, what.....	413
2296. Who may appoint and who may be an agent.....	413
2297. Agents, general or special.....	413
2298. Agency, actual or ostensible.....	413
2299. Actual agency.....	413
2300. Ostensible agency.....	413

## CONTENTS.

lxvii

### ARTICLE II.

#### AUTHORITY OF AGENTS.

SECTION 2304. What authority may be conferred.....	414
2305. Agent may perform acts required of principal by Code.....	414
2306. Agent cannot have authority to defraud principal.....	414
2307. Creation of agency.....	414
2308. Consideration unnecessary.....	414
2309. Form of authority.....	414
2310. Ratification of agent's act.....	415
2311. Ratification of part of a transaction.....	415
2312. When ratification void.....	415
2313. Ratification not to work injury to third persons.....	415
2314. Rescission of ratification.....	415
2315. Measure of agent's authority.....	415
2316. Actual authority, what.....	415
2317. Ostensible authority, what.....	416
2318. Agent's authority as to persons having notice of restrictions upon it.....	416
2319. Agent's necessary authority.....	416
2320. Agent's power to disobey instructions.....	416
2321. Authority to be construed by its specific, rather than by its general terms.....	416
2322. Exceptions to general authority.....	416
2323. What included in authority to sell personal property.....	417
2324. What included in authority to sell real property.....	417
2325. Authority of general agent to receive price of property.....	417
2326. Authority of special agent to receive price.....	417

### ARTICLE III.

#### MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

SECTION 2330. Principal, how affected by acts of agent within the scope of his authority.....	417
2331. Principal, when bound by incomplete execution of authority.....	418
2332. Notice to agent, when notice to principal.....	418
2333. Obligation of principal when agent exceeds his authority.....	418
2334. For acts done under a merely ostensible authority.....	418
2335. When exclusive credit is given to agent.....	418
2336. Rights of person who deals with agent without knowledge of his agency.....	418
2337. Principal's responsibility for agent's negligence or omission.....	418
2338. Principal's responsibility for wrongs wilfully committed by the agent.....	418

### ARTICLE IV.

#### OBLIGATIONS OF AGENTS TO THIRD PERSONS.

SECTION 2342. Warranty of authority.....	419
2343. Agent's responsibility to third persons.....	419
2344. Obligation of agent to surrender property to third person.....	420
2345. Agent not having capacity to contract.....	420

## CONTENTS.

## ARTICLE V.

## DELEGATION OF AGENCY.

SECTION 2349. Agent's delegation of his powers.....	420
2350. Agent's unauthorized employment of sub-agent.....	420
2351. Sub-agent rightfully appointed, represents principal.....	420

## ARTICLE VI.

## TERMINATION OF AGENCY.

SECTION 2355. Termination of agency.....	421
2356. Same.....	421

## CHAPTER II.

## PARTICULAR AGENCIES.

## ARTICLE I. AUCTIONEERS.

## II. FACTORS.

## III. SHIPMASTERS AND PILOTS.

## IV. SHIPS' MANAGERS.

## ARTICLE I.

## AUCTIONEERS.

SECTION 2362. Auctioneer's authority from the seller.....	421
2363. Auctioneer's authority from the bidder.....	422

## ARTICLE II.

## FACTORS.

SECTION 2367. Factor, what.....	422
2368. Actual authority of factor.....	422
2369. Ostensible authority.....	422

## ARTICLE III.

## SHIPMASTERS AND PILOTS.

SECTION 2373. Authority of shipmaster on behalf of shipowner.....	423
2374. Authority to borrow.....	423
2375. Authority on behalf of owners of cargo.....	423
2376. Power to make contracts.....	423
2377. Power to hypothecate.....	423
2378. Master's power to sell ship.....	424
2379. Master's power to sell cargo.....	424
2380. Authority to ransom ship.....	424
2381. Abandonment terminates master's power.....	424
2382. Personal liability for contracts concerning the ship.....	424
2383. Liability for acts of persons employed upon the ship.....	424
2384. Responsibility for negligence of pilot.....	424

## CONTENTS.

lxix

### ARTICLE IV.

#### SHIPS' MANAGERS.

SECTION 2388. What powers manager has.....	425
2389. What powers he has not.....	425

## TITLE X.

### PARTNERSHIP.

#### CHAPTER I. PARTNERSHIP IN GENERAL.

##### II. GENERAL PARTNERSHIP.

##### III. SPECIAL PARTNERSHIP.

##### IV. MINING PARTNERSHIP.

### CHAPTER I.

#### PARTNERSHIP IN GENERAL.

##### ARTICLE I. WHAT CONSTITUTES A PARTNERSHIP.

##### II. PARTNERSHIP PROPERTY.

##### III. MUTUAL OBLIGATIONS OF PARTNERS.

##### IV. RENUNCIATION OF PARTNERSHIP.

### ARTICLE I.

#### WHAT CONSTITUTES A PARTNERSHIP.

SECTION 2395. Partnership, what.....	426
2396. Ship owners.....	426
2397. Formation of partnership.....	426

### ARTICLE II.

#### PARTNERSHIP PROPERTY.

SECTION 2401. Partnership property, what.....	426
2402. Partners' interest in partnership property.....	426
2403. Partners share in profits and losses.....	426
2404. When division of losses implied.....	427
2405. Partner may require application of partnership property to payment of debts.....	427
2406. What property is partnership property by presumption.....	427

### ARTICLE III.

#### MUTUAL OBLIGATIONS OF PARTNERS.

SECTION 2410. Partners trustees for each other.....	427
2411. Good faith to be observed between them.....	427
2412. Mutual liability of partners to account.....	428
2413. No compensation for services to firm.....	428

## CONTENTS.

## ARTICLE IV.

## RENUNCIATION OF PARTNERSHIP.

SECTION 2417. Renunciation of future profits exonerates from liability.....	428
2418. Effect of renunciation.....	428

## CHAPTER II.

## GENERAL PARTNERSHIP.

## ARTICLE I. WHAT IS A GENERAL PARTNERSHIP.

## II. POWERS AND AUTHORITY OF PARTNERS.

## III. MUTUAL OBLIGATIONS OF PARTNERS.

## IV. LIABILITY OF PARTNERS.

## V. TERMINATION OF PARTNERSHIP.

## VI. LIQUIDATION.

## VII. OF THE USE OF FICTITIOUS NAMES.

## ARTICLE I.

## WHAT IS A GENERAL PARTNERSHIP.

SECTION 2424. General partnership, what.....	429
--	-----

## ARTICLE II.

## POWERS AND AUTHORITY OF PARTNERS.

SECTION 2428. Power of majority of partners.....	429
2429. Authority of individual partner.....	429
2430. What authority partner has not.....	430
2431. Partner's acts in bad faith, when ineffectual.....	430

## ARTICLE III.

## MUTUAL OBLIGATIONS OF PARTNERS.

SECTION 2435. Profits of individual partner.....	430
2436. In what business partner may not engage.....	430
2437. In what he may engage.....	431
2438. Must account to firm for profits.....	431

## ARTICLE IV.

## LIABILITY OF PARTNERS.

SECTION 2442. Liability of partners to third persons.....	431
2443. Liability for each other's acts as agents.....	431
2444. Liability of one held out as partner.....	431
2445. No one liable as partner unless held out as such.....	431

## ARTICLE V.

## TERMINATION OF PARTNERSHIP.

SECTION 2449. Duration of partnership.....	432
2450. Total dissolution of partnership.....	432

## CONTENTS.

lxxi

SECTION 2451. Partial dissolution.....	432
2452. Partner entitled to dissolution.....	432
2453. Notice of termination.....	433
2454. Notice by change of name.....	433

### ARTICLE VI.

#### LIQUIDATION.

SECTION 2458. Powers of partners after dissolution.....	433
2459. Who may act in liquidation.....	433
2460. Who may not act in liquidation.....	434
2461. Powers of partners in liquidation.....	434
2462. What partner may do in liquidation.....	434

### ARTICLE VII.

#### OF THE USE OF FICTITIOUS NAMES.

SECTION 2466. Fictitious name.....	434
2467. Style of foreign partnership.....	434
2468. Continuation of style of firm having foreign business relations.....	435
2469. Certificates stating names, etc., what to contain, and to be filed and published.....	435
2470. Register of such firms to be kept by County Clerk.....	435
2471. Certified copies of register, and proof of publication, to be evidence...	435

## CHAPTER III.

### SPECIAL PARTNERSHIP.

#### ARTICLE I. FORMATION OF PARTNERSHIP.

##### II. POWERS, RIGHTS AND DUTIES OF THE PARTNERS.

##### III. LIABILITY OF PARTNERS.

##### IV. ALTERATION AND DISSOLUTION OF THE PARTNERSHIP.

### ARTICLE I.

#### FORMATION OF PARTNERSHIP.

SECTION 2477. Formation of special partnership.....	436
2478. Of what to consist.....	436
2479. Certified statement.....	436
2480. Acknowledged and recorded. False statement.....	437
2481. Affidavit as to sums contributed.....	437
2482. No partnership until compliance.....	437
2483. Certificate to be published.....	437
2484. Affidavit of publication filed.....	437
2485. Renewal of special partnership.....	438

## CONTENTS.

## ARTICLE II.

## POWERS, RIGHTS AND DUTIES OF THE PARTNERS.

SECTION 2489. Who to do business.....	438
2490. Special partners may advise.....	438
2491. May loan money. Insolvency.....	438
2492. General partners may sue and be sued.....	438
2493. Withdrawal of capital.....	439
2494. Interest and profits.....	439
2495. Result of withdrawing capital.....	439
2496. Preferential transfer void.....	439

## ARTICLE III.

## LIABILITY OF PARTNERS.

SECTION 2500. Liability of partners.....	439
2501. Of special partners.....	439
2502. Liability for unintentional act.....	440
2503. Who may question existence of special partnership.....	440

## ARTICLE IV.

## ALTERATION AND DISSOLUTION.

SECTION 2507. When special partnership becomes general.....	440
2508. How new special partners may be admitted .....	441
2509. Dissolution of special partnerships. Notice.....	441
2510. The name of a special partner not used, unless.....	441

## CHAPTER IV.

## MINING PARTNERSHIPS.

SECTION 2516. Special mining partnerships formed as other special partnerships.	
Additional statement in certificate.....	442
2517. Meeting to levy assessments, how called and how proved to be valid.	442
2518. How notices shall be served and proof thereof made.....	442
2519. Assessment, what and how levied. When to be paid, and shares, how forfeited and to whom.....	443
2520. How, on what notice, and by whom sales to be made. Deed made and what it is proof of.....	443
2521. Assessments not to exceed certain amount. Additional assessment, when and how levied.....	444

## TITLE XI.

## INSURANCE.

## CHAPTER I. INSURANCE IN GENERAL.

## II. MARINE INSURANCE.

## III. FIRE INSURANCE.

## IV. LIFE AND HEALTH INSURANCE.



# CONTENTS.

lxxiii

## CHAPTER I.

### INSURANCE IN GENERAL.

#### ARTICLE I. DEFINITION OF INSURANCE.

##### II. WHAT MAY BE INSURED.

##### III. PARTIES.

##### IV. INSURABLE INTEREST.

##### V. CONCEALMENT AND REPRESENTATION.

##### VI. THE POLICY.

##### VII. WARRANTIES.

##### VIII. PREMIUMS.

##### IX. LOSS.

##### X. NOTICE OF LOSS.

##### XI. DOUBLE INSURANCE.

##### XII. RE-INSURANCE.

#### ARTICLE I.

##### DEFINITION OF INSURANCE.

SECTION 2527. Insurance, what.....	445
------------------------------------	-----

#### ARTICLE II.

##### WHAT MAY BE INSURED.

SECTION 2531. What events may be insured against.....	445
2532. Insurance of lottery or lottery prize unauthorized.....	445
2533. Usual kinds of insurance.....	445
2534. All subject to this chapter.....	445

#### ARTICLE III.

##### PARTIES TO THE CONTRACT.

SECTION 2538. Designation of parties.....	446
2539. Who may insure.....	446
2540. Who may be insured.....	446
2541. Assignment to mortgagee of thing insured.....	446
2542. New contract between insurer and assignee.....	446

#### ARTICLE IV.

##### INSURABLE INTEREST.

SECTION 2546. Insurable interest, what.....	447
2547. In what may consist.....	447
2548. Interest of carrier or depositary.....	447
2549. Mere expectancies.....	447
2550. Measure of interest in property.....	447
2551. Insurance without interest, illegal.....	448
2552. When interest must exist.....	448
2553. Effect of transfer.....	448
2554. Transfer after loss.....	448

SECTION 2555. Exception in the case of several subjects in one policy.....	448
2556. In case of the death of the insurer.....	448
2557. In the case of transfer between co-tenants.....	448

## ARTICLE V.

## CONCEALMENT AND REPRESENTATIONS.

SECTION 2561. Concealment, what.....	449
2562. Effect of concealment .....	449
2563. What must be disclosed.....	449
2564. Matters which need not be communicated without inquiry.....	450
2565. Test of materiality.....	450
2566. Matters which each is bound to know.....	450
2567. Waiver of communication.....	450
2568. Interest of insured.....	450
2569. Fraudulent warranty.....	450
2570. Matters of opinion.....	451
2571. Representation, what.....	451
2572. When made.....	451
2573. How interpreted.....	451
2574. Representation as to future.....	451
2575. How may affect policy.....	451
2576. When may be withdrawn.....	451
2577. Time intended by representation.....	451
2578. Representing information.....	451
2579. Falsity.....	452
2580. Effect of falsity.....	452
2581. Materiality.....	452
2582. Application of provisions of this article.....	452

## ARTICLE VI.

## THE POLICY.

SECTION 2586. Policy, what .....	452
2587. What must be specified in a policy.....	453
2588. Whose interest is covered.....	453
2589. Insurance by agent or trustee.....	453
2590. Insurance by part owner.....	453
2591. General terms.....	453
2592. Successive owners.....	453
2593. Transfer of the thing insured.....	453
2594. Open and valued policies.....	454
2595. Open policy, what.....	454
2596. Valued policy, what .....	454
2597. Running policy, what.....	454
2598. Effect of receipt.....	454
2599. Agreement not to transfer.....	454

## ARTICLE VII.

## WARRANTIES.

SECTION 2603. Warranty, express or implied.....	455
2604. Form.....	455

## CONTENTS.

lxxv

Section 2605. Warranty must be in policy.....	455
2606. Past, present and future warranties.....	455
2607. Warranty as to past or present.....	455
2608. Warranty as to the future.....	455
2609. Performance excused.....	455
2610. What acts avoid the policy.....	455
2611. Policy may provide for avoidance.....	455
2612. Breach without fraud.....	456

### ARTICLE VIII.

#### PREMIUM.

Section 2616. When premium is earned.....	456
2617. Return of premium.....	456
2618. When none allowed.....	456
2619. Return for fraud.....	456
2620. Over-insurance by several insurers.....	457
2621. Contribution.....	457
2622. Proportionate contribution.....	457

### ARTICLE IX.

#### LOSS.

Section 2626. Perils, remote and proximate.....	457
2627. Loss incurred in rescue from peril.....	458
2628. Excepted perils.....	458
2629. Negligence and fraud.....	458

### ARTICLE X.

#### NOTICE OF LOSS.

Section 2633. Notice of loss.....	458
2634. Preliminary proofs.....	458
2635. Waivers of defects in notice, etc.....	458
2636. Waiver of delay.....	459
2637. Certificate, when dispensed with.....	459

### ARTICLE XI.

#### DOUBLE INSURANCE.

Section 2641. Double insurance.....	459
2642. Contribution in case of double insurance.....	459

### ARTICLE XII.

#### RE-INSURANCE.

Section 2646. Re-insurance, what.....	460
2647. Disclosures required. ....	460
2648. Re-insurance presumed to be against liability.....	460
2649. Original insured has no interest.....	460

## CONTENTS.

## CHAPTER II.

## MARINE INSURANCE.

## ARTICLE I. DEFINITION OF MARINE INSURANCE.

## II. INSURABLE INTEREST.

## III. CONCEALMENT.

## IV. REPRESENTATIONS.

## V. IMPLIED WARRANTIES.

## VI. THE VOYAGE, AND DEVIATION.

## VII. LOSS.

## VIII. ABANDONMENT.

## IX. MEASURE OF INDEMNITY.

## ARTICLE I.

## DEFINITION OF MARINE INSURANCE.

SECTION 2655. Marine insurance, what.....	461
---	-----

## ARTICLE II.

## INSURABLE INTEREST.

SECTION 2659. Insurable interest in a ship.....	461
2660. Interest reduced by bottomry.....	461
2661. Freightage, what.....	461
2662. Expected freightage.....	461
2663. Interest in expected freightage, what.....	462
2664. Insurable interest in profits.....	462
2665. Insurable interest of charterer.....	462

## ARTICLE III.

## CONCEALMENT.

SECTION 2669. Information must be communicated.....	462
2670. Material information.....	462
2671. Presumption of knowledge of loss.....	463
2672. Concealments which only affect the risk in question.....	463

## ARTICLE IV.

## REPRESENTATIONS.

SECTION 2676. Effect of intentional falsity.....	463
2677. Representation of expectation.....	463

## ARTICLE V.

## IMPLIED WARRANTIES.

SECTION 2681. Warranty of seaworthiness.....	464
2682. Seaworthiness, what.....	464
2683. At what time seaworthiness must exist.....	464
2684. What things are required to constitute seaworthiness.....	464
2685. Different degrees of seaworthiness at different stages of the voyage....	464

## CONTENTS.

lxxvii

SECTION 2686. Unseaworthiness during the voyage.....	465
2687. Seaworthiness for purposes of insurance on cargo.....	465
2688. Neutral papers.....	465

### ARTICLE VI.

#### THE VOYAGE AND DEVIATION.

SECTION 2692. Voyage insured, how determined.....	465
2693. Course of sailing, how determined.....	465
2694. Deviation, what.....	465
2695. When proper.....	466
2696. When improper.....	466
2697. Deviation exonerates the insurer.....	466

### ARTICLE VII.

#### LOSS.

SECTION 2701. Total and partial loss.....	466
2702. Partial loss.....	466
2703. Actual and constructive total loss.....	467
2704. Actual total loss, what.....	467
2705. Constructive total loss.....	467
2706. Presumed actual loss.....	467
2707. Insurance on cargo, etc., when voyage is broken up.....	467
2708. Cost of reshipment, etc.....	467
2709. When insured is entitled to payment.....	467
2710. Abandonment of goods on insurance of profits.....	468
2711. Average loss.....	468
2712. Insurance against total loss.....	468

### ARTICLE VIII.

#### ABANDONMENT.

SECTION 2716. Abandonment, what.....	468
2717. When insured may abandon.....	469
2718. Must be unqualified.....	469
2719. When may be made.....	469
2720. Abandonment may be defeated.....	469
2721. How made.....	469
2722. Requisites of notice.....	470
2723. No other cause can be relied on.....	470
2724. Effect.....	470
2725. Waiver of formal abandonment.....	470
2726. Agents of the insured become agents of the insurer.....	470
2727. Acceptance not necessary.....	470
2728. Acceptance conclusive.....	470
2729. Accepted abandonment, irrevocable.....	470
2730. Freightage, how affected by abandonment of ship.....	470
2731. Refusal to accept.....	471
2732. Omission to abandon.....	471

## CONTENTS.

## ARTICLE IX.

## MEASURE OF INDEMNITY.

SECTION 2736. Valuation, when conclusive.....	471
2737. Partial loss.....	471
2738. Profits.....	472
2739. Valuation apportioned.....	472
2740. Valuation applied to profits.....	472
2741. Estimating loss under an open policy.....	472
2742. Arrival of thing damaged.....	472
2743. Labor and expenses.....	473
2744. General average.....	473
2745. Contribution.....	473
2746. One-third new for old.....	473

## CHAPTER III.

## FIRE INSURANCE.

SECTION 2752. False representation.....	474
2753. Alteration increasing risk.....	474
2754. Alteration not increasing risk.....	474
2755. Acts of the insured.....	474
2756. Measure of indemnity..	474

## CHAPTER IV.

## LIFE AND HEALTH INSURANCE.

SECTION 2762. Insurance upon life, when payable.....	474
2763. Insurable interest.....	475
2764. Assignee, etc., of life policy need have no interest.....	475
2765. Notice of transfer.....	475
2766. Measure of indemnity.....	475

## TITLE XII.

## INDEMNITY.

SECTION 2772. Indemnity, what.....	476
2773. Indemnity for a future wrongful act, void.....	476
2774. Indemnity for a past wrongful act, valid.....	476
2775. Indemnity extends to acts of agents.....	476
2776. Indemnity to several.....	476
2777. Person indemnifying, liable jointly or severally with person indemnified.....	476
2778. Rules for interpreting agreement of indemnity.....	477
2779. When person indemnifying is a surety.....	477
2780. Bail, what.....	478
2781. How regulated.....	478

## CONTENTS.

lxxix

### TITLE XIII.

#### GUARANTY.

##### CHAPTER I. GUARANTY IN GENERAL. II. SURETYSHIP.

#### CHAPTER I.

##### GUARANTY IN GENERAL.

###### ARTICLE I. DEFINITION OF GUARANTY. II. CREATION OF GUARANTY. III. INTERPRETATION OF GUARANTY. IV. LIABILITY OF GUARANTORS. V. CONTINUING GUARANTY. VI. EXONERATION OF GUARANTORS.

###### ARTICLE I.

###### DEFINITION OF GUARANTY.

SECTION 2787. Guaranty, what.....	478
2788. Knowledge of principal not necessary to creation of guaranty.....	479

###### ARTICLE II.

###### CREATION OF GUARANTY.

SECTION 2792. Necessity of a consideration.....	479
2793. Guaranty to be in writing, etc.....	479
2794. Engagement to answer for obligation of another, when deemed original.....	480
2795. Acceptance of guaranty.....	481

###### ARTICLE III.

###### INTERPRETATION OF GUARANTY.

SECTION 2799. Guaranty of incomplete contract.....	481
2800. Guaranty that an obligation is good or collectible.....	481
2801. Recovery upon such guaranty.....	481
2802. Guarantor's liability upon such guaranty.....	482

###### ARTICLE IV.

###### LIABILITY OF GUARANTORS.

SECTION 2806. Guaranty, how construed.....	483
2807. Liability upon guaranty of payment or performance.....	483
2808. Liability upon guaranty of a conditional obligation.....	483
2809. Obligation of guarantor cannot exceed that of the principal.....	483
2810. Guarantor not liable on an illegal contract.....	483

## CONTENTS.

## ARTICLE V.

## CONTINUING GUARANTY.

SECTION 2814. Continuing guaranty, what.....	484
2815. Revocation.....	484

## ARTICLE VI.

## EXONERATION OF GUARANTORS.

SECTION 2819. What dealings with debtor exonerate guarantor.....	484
2820. Void promises.....	484
2821. Rescission of alteration.....	484
2822. Part performance.....	485
2823. Delay of creditor does not discharge guarantor.....	485
2824. Guarantor indemnified by the debtor, not exonerated.....	485
2825. Discharge of principal by act of law does not discharge guarantor....	485

## CHAPTER II.

## SURETYSHIP.

- ARTICLE I. WHO ARE SURETIES.  
 II. LIABILITY OF SURETIES.  
 III. RIGHTS OF SURETIES.  
 IV. RIGHTS OF CREDITORS.  
 V. LETTER OF CREDIT.

## ARTICLE I.

## WHO ARE SURETIES.

SECTION 2831. Surety, what.....	485
2832. Apparent principal may show that he is surety.....	486

## ARTICLE II.

## LIABILITY OF SURETIES.

SECTION 2836. Limit of surety's obligation.....	487
2837. Rules of interpretation.....	487
2838. Judgment against surety does not alter the relation.....	487
2839. Surety exonerated by performance or offer of performance.....	487
2840. Surety discharged by certain acts of the creditor.....	487

## ARTICLE III.

## RIGHTS OF SURETIES.

SECTION 2844. Surety has rights of guarantor.....	488
2845. Surety may require the creditor to proceed against the principal.....	488
2846. Surety may compel principal to perform obligation, when due.....	488
2847. A principal bound to reimburse his surety.....	488
2848. The surety acquires the right of the creditor.....	488
2849. Surety entitled to benefit of securities held by creditor.....	488
2850. The property of principal to be taken first.....	488



## CONTENTS.

lxxxi

### ARTICLE IV.

#### RIGHTS OF CREDITORS.

SECTION 2854. Creditor entitled to benefit of securities held by surety.....	489
--	-----

### ARTICLE V.

#### LETTER OF CREDIT.

SECTION 2858. Letter of credit, what.....	489
2859. How addressed.....	489
2860. Liability of the writer.....	489
2861. Letters of credit either general or special.....	489
2862. Nature of general letter of credit.....	490
2863. Extent of general letter of credit.....	490
2864. A letter of credit may be a continuing guaranty.....	490
2865. When notice to the writer necessary.....	490
2866. The credit given must agree with the terms of the letter.....	490

## TITLE XIV.

### LIEN.

#### CHAPTER I. LIENS IN GENERAL.

##### II. MORTGAGE.

##### III. PLEDGE.

##### IV. BOTTOMRY.

##### V. RESPONDENTIA.

##### VI. OTHER LIENS.

##### VII. STOPPAGE IN TRANSIT.

### CHAPTER I.

#### LIENS IN GENERAL.

##### ARTICLE I. DEFINITION OF LIENS.

##### II. CREATION OF LIENS.

##### III. EFFECT OF LIENS.

##### IV. PRIORITY OF LIENS.

##### V. REDEMPTION FROM LIENS.

##### VI. EXTINCTION OF LIENS.

### ARTICLE I.

#### DEFINITION OF LIENS.

SECTION 2872. Lien, what.....	491
2873. Liens, general or special.....	492
2874. General lien, what.....	492
2875. Special lien, what.....	492
2876. Prior liens.....	492
2877. Contracts subject to provisions of this chapter.....	492

## CONTENTS.

## ARTICLE II.

## CREATION OF LIENS.

SECTION 2881. Lien, how created.....	492
2882. No lien for claim not due.....	492
2883. Lien on future interest.....	493
2884. Lien may be created by contract.....	493

## ARTICLE III.

## EFFECT OF LIENS.

SECTION 2888. Lien, or contract for lien, transfers no title.....	493
2889. Certain contracts, void.....	493
2890. Creation of lien does not imply personal obligation.....	493
2891. Extent of lien.....	493
2892. Existence of lien does not affect the right of creditor.....	494
2893. Holder of lien not entitled to compensation.....	494

## ARTICLE IV.

## PRIORITY OF LIENS.

SECTION 2897. Priority of liens.....	494
2898. Priority of mortgage for price.....	494
2899. Order of resort to different funds.....	494

## ARTICLE V.

## REDEMPTION FROM LIEN.

SECTION 2903. Right to redeem.....	495
2904. Rights of inferior lienor.....	495
2905. Redemption from lien, how made.....	495

## ARTICLE VI.

## EXTINCTION OF LIENS.

SECTION 2909. Lien deemed accessory to the act whose performance it secures.....	496
2910. Extinction by sale or conversion.....	496
2911. Lien not extinguished by lapse of time under statute of limitation.....	496
2912. Apportionment of lien.....	496
2913. When restoration extinguishes lien.....	496

## CHAPTER II.

## MORTGAGE.

## ARTICLE I. MORTGAGES IN GENERAL.

## II. MORTGAGE OF REAL PROPERTY.

## III. MORTGAGE OF PERSONAL PROPERTY.

## CONTENTS.

lxxxiii

### ARTICLE I.

#### MORTGAGES IN GENERAL.

SECTION 2919. Mortgage, what.....	497
2920. Lien of a mortgage, when special.....	497
2921. Transfer of interest, when deemed a mortgage.....	497
2922. Provisions of this chapter do not affect bottomry or respondentia.....	498
2923. Transfer made subject to defeasance, may be proved.....	498
2924. What interests may be mortgaged.....	498
2925. Property adversely held may be mortgaged.....	498
2926. Power of sale.....	498
2927. Power of sale, how executed.....	498
2928. On what a lien.....	498
2929. Mortgage of thing held adversely.....	498
2930. Mortgage does not entitle mortgagee to possession.....	499
2931. Foreclosure.....	499
2932. Waste.....	499

### ARTICLE II.

#### MORTGAGE OF REAL PROPERTY.

SECTION 2936. Mortgage of real property defined.....	499
2937. How created.....	500
2938. Form of mortgage.....	500
2939. Mortgage not a personal obligation.....	500
2940. By whom paid after property passes by succession or will.....	501
2941. How acknowledged and recorded.....	501
2942. Chaps. IV and V, on recording, etc., applied.....	501
2943. Encumbrances protected by recording laws.....	501
2944. Encumbrances presumed to be acquired in good faith, etc.....	501
2945. Subsequently acquired title inures to mortgagee.....	501
2946. What must be recorded as mortgage.....	502
2947. Recording assignment of mortgage.....	502
2948. Mortgage, how discharged.....	502
2949. Same.....	502
2950. Same.....	502
2951. Penalty for not acknowledging satisfaction.....	503

### ARTICLE III.

#### PERSONAL MORTGAGE.

SECTION 2956. Mortgage on personal property, a personal mortgage.....	504
2957. Property subject to.....	504
2958. Same.....	504
2959. How created.....	504
2960. Power of attorney to execute.....	504
2961. Form of.....	504
2962. Must be authenticated.....	505
2963. Must be recorded.....	505
2964. Other sections on recording made applicable.....	506
2965. Recorded in different places.....	506
2966. Time allowed for travel to Recorder's office.....	506
2967. Property in transit exempt.....	506

SECTION 2968. Property of common carrier, where recorded.....	506
2969. Property exempt from operation of the mortgage, when.....	506
2970. Same.....	507
2971. Same.....	507
2972. Recorded mortgage, notice.....	507
2973. Personal mortgage, how satisfied on record.....	507
2974. How satisfied.....	507
2975. Mortgagee may foreclose.....	508
2976. Creditors of mortgageor, remedy.....	508
2977. Creditors of mortgagee, remedy.....	508
2978. Does not apply to ships.....	508

## CHAPTER III.

## PLEDGE.

SECTION 2986. Pledge, what.....	509
2987. When contract is to be deemed a pledge.....	509
2988. Delivery essential to validity of pledge.....	510
2989. Increase of thing.....	510
2990. Lienor may pledge property to extent of his lien.....	510
2991. Real owner cannot defeat pledge of property transferred to apparent owner for purpose of pledge.....	510
2992. Pledge lender, what.....	510
2993. Pledge holder, what.....	510
2994. When pledge lender may withdraw property pledged.....	510
2995. Obligations of pledge holder.....	510
2996. Pledge holder must enforce rights of pledgee.....	511
2997. Obligation of pledgee and pledge holder, for reward.....	511
2998. Gratuitous pledge holder.....	511
2999. Debtor's misrepresentation of value of pledge.....	511
3000. When pledgee may sell.....	511
3001. When pledgee must demand performance.....	511
3002. Notice of sale to pledgeor.....	511
3003. Waiver of notice of sale.....	512
3004. Waiver of demand.....	512
3005. Sale must be by auction.....	512
3006. Pledgee's sale of securities.....	512
3007. Sale on the demand of the pledgeor.....	512
3008. Surplus to be paid to pledgeor.....	512
3009. Same.....	513
3010. Pledgee's purchase of property pledged.....	513
3011. Pledgee may foreclose right of redemption.....	513*

## CHAPTER IV.

## BOTTOMRY.

SECTION 3017. Bottomry, what.....	514
3018. Owner of ship may hypothecate.....	514
3019. When master may hypothecate ship.....	516
3020. Same.....	515

## CONTENTS.

lxxxv

SECTION 3021. When master may hypothecate freight money.....	515
3022. Rate of interest.....	515
3023. Rights of lender, when no necessity for bottomry existed.....	515
3024. Stipulation for personal liability void.....	515
3025. When money loaned is to be repaid.....	515
3026. When bottomry loan becomes due.....	516
3027. Bottomry lien, how lost.....	516
3028. Preference of bottomry lien over other liens.....	516
3029. Priority of bottomry liens.....	516

## CHAPTER V.

### RESPONDENTIA.

SECTION 3036. Respondentia, what .....	516
3037. Respondentia by owner.....	517
3038. Respondentia by master.....	517
3039. Rate of interest.....	517
3040. Obligations of ship owner.....	517

## CHAPTER VI.

### OTHER LIENS.

SECTION 3046. Lien of seller of real property.....	518
3047. When transfer of contract waves lien.....	518
3048. Extent of seller's lien.....	518
3049. Lien of seller of personal property.....	518
3050. Purchaser's lien on real property.....	518
3051. Lien for services.....	519
3052. Liens on personal property.....	519
3053. Innkeeper, definition of.....	519
3054. Innkeeper's lien, what it extends to, generally .....	519
3055. Not measured by propriety of supplies.....	519
3056. Goods must be delivered and received in character of guest and innkeeper.....	520
3057. Extends only to goods which innkeeper is bound to receive.....	520
3058. Extends to stolen property.....	520
3059. Extends to horses.....	520
3060. Boarding-house keeper included as innkeeper.....	520
3061. Lien of factor. ....	520
3062. Banker's lien.....	521
3063. Shipmaster's lien.....	521
3064. Seamen's lien.....	521
3065. Officer's lien.....	521
3066. Attorneys' lien .....	521
3067. Judgment lien.....	521
3068. Mechanic's lien.. ..	521
3069. Lien on ships.....	522
3070. Enforcement of lien.....	522

## CHAPTER VII.

## STOPPAGE IN TRANSIT.

SECTION 3076. When consignor may stop goods.....	522
3077. What is insolvency of consignee.....	522
3078. Transit, when ended.....	522
3079. Stoppage, how effected.....	523
3080. Effect of stoppage.....	523

## TITLE XV.

## NEGOTIABLE INSTRUMENTS.

## CHAPTER I. NEGOTIABLE INSTRUMENTS IN GENERAL.

## II. BILLS OF EXCHANGE.

## III. PROMISSORY NOTES.

## IV. CHECKS.

## V. BANK NOTES AND CERTIFICATES OF DEPOSIT.

## CHAPTER I.

## NEGOTIABLE INSTRUMENTS IN GENERAL.

## ARTICLE I. GENERAL DEFINITIONS.

## II. INTERPRETATION.

## III. INDORSEMENT.

## IV. PRESENTMENT FOR PAYMENT.

## V. DISHONOR.

## VI. EXCUSE OF PRESENTMENT AND NOTICE.

## VII. EXTINCTION.

## ARTICLE I.

## GENERAL DEFINITIONS.

SECTION 3086. To what instruments this Title is applicable.....	524
3087. Negotiable instrument, what.....	524
3088. Must be for unconditional payment of money.....	524
3089. Payee.....	524
3090. Instrument may be in alternative.....	524
3091. Date, etc.....	524
3092. May contain a pledge, etc.....	524
3093. What it must not contain.....	525
3094. Date.....	525
3095. Different classes of negotiable instruments.....	525

## ARTICLE II.

## INTERPRETATION OF NEGOTIABLE INSTRUMENTS.

SECTION 3099. Time and place of payment.....	525
3100. Place of payment not specified.....	525

## CONTENTS.

lxxxvii

<b>SECTION 3101.</b> Instruments payable to a person or his order, how construed.....	525
3102. Unindorsed note, when negotiable.....	526
3103. Fictitious payee.....	526
3104. Presumption of consideration.....	526

### ARTICLE III.

#### INDORSEMENT.

<b>SECTION 3108.</b> Indorsement, what.....	527
3109. Agreement to indorse.....	527
3110. When may be made on separate paper.....	527
3111. Kinds of indorsement.....	527
3112. General indorsement, what.....	527
3113. Special indorsement, what.....	527
3114. General indorsement, how made, special.....	527
3115. Destruction of negotiability by indorser.....	527
3116. Implied warranty of indorser.....	527
3117. Indorser, when liable to payee.....	528
3118. Indorsement without recourse.....	528
3119. Same. ....	528
3120. Indorsee privy to contract.....	528
3121. Indorser has rights of guarantor.....	528
3122. Rights of accommodation indorser....	529
3123. Effect of want of consideration.....	529
3124. Indorsee in due course, what.....	529
3125. Rights of indorsee in due course.....	529
3126. Instrument left blank.....	530

### ARTICLE IV.

#### PRESENTMENT FOR PAYMENT.

<b>SECTION 3130.</b> Effect of want of demand on principal debtor.....	530
3131. Presentment, how made.....	530
3132. Apparent maturity, when.....	531
3133. Presumptive dishonor of bill, payable after sight.....	531
3134. Apparent maturity of bill, payable at sight.....	531
3135. Apparent maturity of note.....	531
3136. Same. ....	532
3137. Surrender of instrument, when a condition of payment.....	532

### ARTICLE V.

#### DISHONOR OF NEGOTIABLE INSTRUMENTS.

<b>SECTION 3141.</b> Dishonor, what.....	533
3142. Notice, by whom given.....	533
3143. Form of notice.....	533
3144. Notice, how served.....	533
3145. Notice, how served after indorser's death.....	533
3146. Notice given in ignorance of death, valid.....	534
3147. Notice, when to be given.....	534
3148. Notice of dishonor, when to be mailed.....	534
3149. Notice, how given by agent.....	534
3150. Additional time for notice by indorser.....	534
3151. Effect of notice of dishonor.....	534

## CONTENTS.

## ARTICLE VI.

## EXCUSE OF PRESENTMENT AND NOTICE.

SECTION 3155. Notice of dishonor, when excused.....	535
3156. Presentment and notice, when excused.....	535
3157. Same .....	535
3158. Delay, when excused.....	536
3159. Waiver of presentment and notice.....	536
3160. Waiver of protest.....	536

## ARTICLE VII.

## EXTINCTION OF NEGOTIABLE INSTRUMENTS.

SECTION 3164. Obligation of party, when extinguished .....	536
3165. Revival of obligation.....	537

## CHAPTER II.

## BILLS OF EXCHANGE.

## ARTICLE I. FORM AND INTERPRETATION.

## II. DAYS OF GRACE.

## III. PRESENTMENT FOR ACCEPTANCE.

## IV. ACCEPTANCE.

## V. ACCEPTANCE OR PAYMENT FOR HONOR.

## VI. PRESENTMENT FOR PAYMENT.

## VII. EXCUSE OF PRESENTMENT AND NOTICE.

## VIII. FOREIGN BILLS.

## ARTICLE I.

## FORM AND INTERPRETATION OF A BILL.

SECTION 3171. Bill of exchange, what.....	537
3172. Drawee, in case of need.....	538
3173. Bill in parts of a set.....	538
3174. When must be in a set.....	538
3175. Presentment, etc., of part of set.....	538
3176. Bill, where payable.....	538
3177. Rights and obligations of drawer.....	538

## ARTICLE II.

## DAYS OF GRACE.

SECTION 3181. Days of grace .....	539
-----------------------------------	-----

## ARTICLE III.

## PRESENTMENT FOR ACCEPTANCE.

SECTION 3185. When a bill may be presented.....	539
3186. Presentment, how made.....	539
3187. Presentment to joint drawees.....	540
3188. When presentment to be made to drawee in case of need.....	540
3189. Presentment, when must be made.....	540



## CONTENTS.

lxxxix

### ARTICLE IV.

#### ACCEPTANCE.

SECTION 3193. Acceptance, how made.....	540
3194. Holder entitled to acceptance on face of bill.....	541
3195. What acceptance sufficient with consent of holder.....	541
3196. Acceptance by separate instrument.....	541
3197. Promise to accept, when equivalent to acceptance.....	541
3198. Cancellation of acceptance.....	541
3199. What is admitted by acceptance.....	542

### ARTICLE V.

#### ACCEPTANCE OR PAYMENT FOR HONOR.

SECTION 3203. When bill may be accepted or paid for honor.....	542
3204. Holder of bill of exchange bound to accept payment for honor.....	542
3205. Acceptance for honor, how made.....	542
3206. How enforced.....	542
3207. Notice of dishonor not excused by acceptance for honor.....	543

### ARTICLE VI.

#### PRESENTMENT FOR PAYMENT.

SECTION 3211. Presentment, when bill not accepted, where made.....	543
3212. Presentment of bill, payable at particular place.....	543
3213. Effect of delay in presentment in certain cases.....	543
3214. Effect in other cases.....	543

### ARTICLE VII.

#### EXCUSE OF PRESENTMENT AND NOTICE.

SECTION 3218. Presentment, when excused.....	544
3219. Delay, when excused.....	544
3220. Presentment and notice, when excused.....	544

### ARTICLE VIII.

#### FOREIGN BILLS.

SECTION 3224. Definitions.....	544
3225. Protest necessary.....	545
3226. Protest, by whom made.....	545
3227. Protest, how made.....	545
3228. Protest, where made.....	545
3229. Protest, when to be made.....	545
3230. Protest, when excused.....	545
3231. Notice of protest, how given.....	545
3232. Waiver of protest.....	546
3233. Declaration before payment for honor.....	546
3234. Damages allowed on dishonor of foreign bill.....	546
3235. Rate of damages.....	546
3236. Interest on amount of protested bill.....	546
3237. Damages, how estimated.....	547
3238. Same.....	547

## CONTENTS.

### CHAPTER III.

#### PROMISSORY NOTES.

SECTION 3244. Promissory note, what.....	547
3245. Certain instruments, promissory notes.....	547
3246. Bill of exchange, when converted into a note.....	547
3247. Certain sections applicable to notes.....	547
3248. Effect of delay in presentment.....	548

### CHAPTER IV.

#### CHECKS.

SECTION 3254. Check, what.....	548
3255. Rules applicable to checks.....	548

### CHAPTER V.

#### BONDS, BANK NOTES AND CERTIFICATES OF DEPOSIT.

SECTION 3361. Bank note negotiable after payment.....	548
3362. Title acquired by indorsees.....	549

## TITLE XVI.

#### GENERAL PROVISIONS.

SECTION 3268. Parties may waive provisions of Code.....	549
---	-----

## DIVISION FOURTH.

### GENERAL PROVISIONS

APPLICABLE TO PERSONS, PROPERTY AND OBLIGATIONS, OR TO TWO  
OF THOSE SUBJECTS.

#### PART I. RELIEF.

#### II. SPECIAL RELATIONS OF DEBTOR AND CRED- ITOR.

#### III. NUISANCE.

#### IV. MAXIMS OF JURISPRUDENCE.

#### V. DEFINITIONS AND GENERAL PROVISIONS.

## CONTENTS.

xi

### PART I.

#### RELIEF.

- TITLE I. RELIEF IN GENERAL.
- II. COMPENSATORY RELIEF.
- III. SPECIFIC RELIEF.
- IV. PREVENTIVE RELIEF.

### TITLE I.

#### RELIEF IN GENERAL.

SECTION 3274. Species of relief.....	553
3275. Relief in case of forfeiture.....	553

### TITLE II.

#### COMPENSATORY RELIEF.

- CHAPTER I. DAMAGES IN GENERAL.
- II. MEASURE OF DAMAGES.

### CHAPTER I.

#### DAMAGES IN GENERAL.

- ARTICLE I. GENERAL PRINCIPLES.
- II. INTEREST AS DAMAGES.
- III. EXEMPLARY DAMAGES.

#### ARTICLE I.

##### GENERAL PRINCIPLES.

SECTION 3281. Person suffering detriment, may recover damages .....	554
3282. Detriment, what .....	554
3283. Injuries resulting or probable after suit brought.....	554

#### ARTICLE II.

##### INTEREST AS DAMAGES.

SECTION 3287. Person entitled to recover damages, may recover interest thereon.....	555
3288. In actions other than contract.....	555
3289. Limit of rate by contract.....	555
3290. Acceptance of principal waives claim to interest.....	555

#### ARTICLE III.

##### EXEMPLARY DAMAGES.

SECTION 3294. Exemplary damages, in what cases allowed.....	556
---	-----

## CHAPTER II.

## MEASURE OF DAMAGES.

## ARTICLE I. DAMAGES FOR BREACH OF CONTRACT.

## II. DAMAGES FOR WRONGS.

## III. PENAL DAMAGES.

## IV. GENERAL PROVISIONS.

## ARTICLE I.

## DAMAGES FOR BREACH OF CONTRACT.

SECTION 3300. Measure of damages for breach of contract.....	557
3301. Must be in contemplation of parties.....	558
3302. Of which the parties have notice.....	558
3303. Damages must be certain.....	558
3304. Breach of promise to pay liquidated sum.....	558
3305. Dishonor of bills of exchange.....	558
3306. Breach of covenant of seisin, etc.....	558
3307. Rescission of contract by covenantee, when.....	559
3308. Breach of certain Code covenants, how determined.....	559
3309. Damages where title is void.....	559
3310. Damages where title is defective or disputed.....	559
3311. Failure to perfect title not to preclude obtaining relief, when.....	559
3312. On payment of costs before action or judgment, covenantor may perfect title.....	560
3313. Breach of Common Law Covenant against encumbrances.....	560
3314. Damages where encumbrance is upon only a part of the property.....	560
3315. Breach of Special Code Covenants against encumbrances.....	560
3316. Breach of agreement to convey real property.....	560
3317. Breach of agreement to buy real property.....	561
3318. Breach of agreement to sell personal property, not paid for.....	561
3319. Breach of agreement to sell personal property, paid for.....	561
3320. Breach of agreement to pay for personal property sold.....	561
3321. Breach of agreement to buy personal property.....	561
3322. Breach of warranty of title to personal property.....	562
3323. Breach of warranty of quality of personal property.....	562
3324. Breach of warranty of quality for special purpose.....	562
3325. Breach of carrier's obligation to receive goods, etc.....	563
3326. Breach of carrier's obligation to deliver.....	563
3327. Carrier's delay.....	563
3328. Breach of warranty of authority.....	563
3329. Breach of promise of marriage.....	564

## ARTICLE II.

## DAMAGES FOR WRONGS.

SECTION 3333. Breach of obligation other than contract.....	564
3334. Wrongful occupation of real property.....	564
3335. Wilful holding over.....	564
3336. Conversion of personal property.....	565
3337. Same.....	565
3338. Damages of lienor.....	565
3339. Seduction.....	565
3340. Injuries to animals.....	565

## CONTENTS.

xciii

### ARTICLE III.

#### PENAL DAMAGES.

SECTION 3344. Failure to quit, after notice.....	566
3345. Tenant wilfully holding over.....	566
3346. Foreible exclusion from possession of real property.....	566
3347. Injuries to trees, etc.....	566
3348. Injuries inflicted in a duel.....	566
3349. Same.....	567

### ARTICLE IV.

#### GENERAL PROVISIONS.

SECTION 3353. Value, how estimated in favor of seller.....	567
3354. Value, how estimated in favor of buyer.....	567
3355. Property of peculiar value.....	567
3356. Value of thing in action.....	568
3357. Damages allowed in this chapter, exclusive of others.....	568
3358. Limitation of damages.....	568
3359. Damages to be reasonable. ....	568
3360. Nominal damages.....	569

## TITLE III.

### SPECIFIC AND PREVENTIVE RELIEF.

#### CHAPTER I. GENERAL PRINCIPLES.

##### II. SPECIFIC RELIEF.

##### III. PREVENTIVE RELIEF.

### CHAPTER I.

#### GENERAL PRINCIPLES.

SECTION 3366. Specific relief, etc., when allowed.....	569
3367. Specific relief, how given.....	569
3368. Preventive relief, how given.....	570
3369. Not to enforce penalty, etc .....	570

### CHAPTER II.

#### SPECIFIC RELIEF.

##### ARTICLE I. POSSESSION OF REAL PROPERTY.

##### II. POSSESSION OF PERSONAL PROPERTY.

##### III. SPECIFIC PERFORMANCE OF OBLIGATIONS.

##### IV. REVISION OF CONTRACTS.

##### V. RESCISSION OF CONTRACTS.

##### VI. CANCELLATION OF INSTRUMENTS.

# CONTENTS.

## ARTICLE I.

### POSSESSION OF REAL PROPERTY.

SECTION 3375. Judgment for possession or title.....	570
---	-----

## ARTICLE II.

### POSSESSION OF PERSONAL PROPERTY.

SECTION 3379. Judgment for delivery.....	571
3380. When holder may be compelled to deliver.....	571

## ARTICLE III.

### SPECIFIC PERFORMANCE OF OBLIGATIONS.

SECTION 3384. In what cases compelled.....	572
3385. Remedy mutual.....	573
3386. No remedy unless mutual.....	574
3387. Distinction between real and personal property.....	574
3388. Contract signed by one party only, may be enforced by other.....	574
3389. Liquidation of damages not a bar to specific performance.....	574
3390. What cannot be specifically enforced.....	575
3391. What parties cannot be compelled to perform.....	575
3392. What parties cannot have specific performance in their favor.....	575
3393. Specific performance not required when oppressive.....	576
3394. Agreement to sell property by one who has no title.....	576
3395. Relief against parties claiming under person bound to perform.....	576

## ARTICLE IV.

### REVISION OF CONTRACTS.

SECTION 3399. When contract may be revised.....	576
3400. Presumption as to intent of parties. ....	577
3401. Principles of revision.....	577
3402. Enforcement of revised contract.....	577

## ARTICLE V.

### RESCISSION OF CONTRACTS.

SECTION 3406. When rescission may be adjudged.....	577
3407. Rescission for mistake.....	578
3408. Court may require party rescinding to do equity.....	578

## ARTICLE VI.

### CANCELLATION OF INSTRUMENTS.

SECTION 3412. When cancellation may be ordered.....	578
3413. Instrument obviously void.....	578
3414. Cancellation in part .....	578

## CONTENTS.

xcv

### CHAPTER III.

#### PREVENTIVE RELIEF.

Section 3420. Preventive relief, how granted.....	579
3421. Provisional injunctions.....	579
3422. Injunction, when allowed.....	579
3423. Injunction, when not allowed.....	579

## PART II.

### SPECIAL RELATIONS OF DEBTOR AND CREDITOR.

#### TITLE I. GENERAL PRINCIPLES.

##### II. FRAUDULENT INSTRUMENTS AND TRANSFERS.

##### III. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

### TITLE I.

#### GENERAL PRINCIPLES.

Section 3429. Who is a debtor.....	581
3430. Who is a creditor.....	581
3431. Contracts of debtor are valid.....	581
3432. Payments in preference.....	581
3433. Relative rights of different creditors.....	582

### TITLE II.

#### FRAUDULENT INSTRUMENTS AND TRANSFERS.

Section 3439. Transfers, etc., with intent to defraud creditors.....	582
3440. Certain transfers presumed fraudulent.....	583
3441. Rights of purchasers and mortgagees.....	583
3442. Creditor's right must be judicially ascertained.....	583
3443. Question of fraud, how determined.....	583

### TITLE III.

#### ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

Section 3449. When debtor may execute assignment.....	584
3450. Insolvency, what.....	585
3451. Certain transfers not affected.....	585
3452. What debts may be secured.....	585
3453. What preferences may be given.....	586
3454. Preference must be absolute.....	586
3455. Certain rights not affected by preferences in assignment.....	586

SECTION 3456. Joint and separate debts.....	586
3457. Assignment, when void.....	587
3458. The instrument of assignment.....	587
3459. Compliance with provisions of last section necessary to validity of assignment.....	587
3460. Assignee takes, subject to rights of third parties.....	588
3461. Inventory required.....	588
3462. Verification of inventory.....	588
3463. Recording assignment and filing inventory.....	589
3464. Same.....	589
3465. Effect of omitting to record.....	589
3466. Assignment of real property.....	589
3467. Bond of assignees.....	589
3468. Conditions of disposal and conversion.....	590
3469. Accountings.....	590
3470. Property exempt.....	590
3471. Compensation.....	590
3472. Assignees protected for acts done in good faith.....	590
3473. Assent of creditor necessary to modification of assignment.....	590

## PART III.

### NUISANCE.

#### TITLE I. GENERAL PRINCIPLES.

##### II. PUBLIC NUISANCES.

##### III. PRIVATE NUISANCES.

### TITLE I.

#### GENERAL PRINCIPLES.

SECTION 3479. Nuisance, what.....	591
3480. Public nuisance.....	592
3481. Private nuisance.....	592
3482. What is not deemed a nuisance.....	592
3483. Successive owners.....	592
3484. Abatement does not preclude action.....	592

### TITLE II.

#### PUBLIC NUISANCES.

SECTION 3490. Lapse of time does not legalize.....	592
3491. Abatement.....	592
3492. When notice is required.....	593
3493. Remedies for public nuisance.....	593
3494. Action.....	593
3495. How abated.....	593



## CONTENTS.

xcvii

### TITLE III.

#### PRIVATE NUISANCES.

<b>SECTION 3501.</b>	Remedies for private nuisance.....	593
<b>3502.</b>	Abatement, when allowed.....	594
<b>3503.</b>	When notice is required.....	594

---

### PART IV.

#### MAXIMS OF JURISPRUDENCE.

---

### PART V.

#### DEFINITIONS AND GENERAL PROVISIONS.

<b>SECTION 3549.</b>	Code and Common Law one system.....	602
<b>3550.</b>	Code declaration of one Common Law principle does not change others.....	602
<b>3551.</b>	Expression of one subordinate rule does not abrogate others.....	602
<b>3552.</b>	The rule that statutes in derogation of Common Law, not applicable.....	602
<b>3553.</b>	Statutes and Common Law substantially the same—a continuation of.....	602
<b>3554.</b>	How Code is construed.....	602
<b>3555.</b>	Words, how used.....	603
<b>3556.</b>	Sundry words.....	603
<b>3557.</b>	Degrees of care and diligence.....	603
<b>3558.</b>	Care and diligence.....	603
<b>3559.</b>	Degrees of negligence.....	603
<b>3560.</b>	Negligence.....	603
<b>3561.</b>	Children.....	604
<b>3562.</b>	Debtor and creditor.....	604
<b>3563.</b>	Good faith.....	604
<b>3564.</b>	Notice.....	604
<b>3565.</b>	Actual notice.....	604
<b>3566.</b>	Constructive notice.....	604
<b>3567.</b>	Certain persons deemed to have constructive notice.....	604
<b>3568.</b>	Notice, when impossible.....	605
<b>3569.</b>	Paper.....	605
<b>3570.</b>	Person.....	605
<b>3571.</b>	Several.....	605
<b>3572.</b>	Third persons.....	605
<b>3573.</b>	Holidays.....	605
<b>3574.</b>	Same.....	605
<b>3575.</b>	Business days.....	605
<b>3576.</b>	Certain acts not to be done on holidays.....	606

Section 3577. Usage, what.....	606
3578. Same.....	606
3579. Value.....	606
3580. Verdict.....	606
3581. Time.....	607
3582. Genders.....	607
3583. Numbers.....	607
3584. Tense.....	607
3585. "Compound interest," what.....	607
3586. "Signature," what.....	607
3587. "Writing," what.....	607
3588. "Oath," what.....	607
3589. "Seal," what.....	608
3590. "State," what.....	608
3591. Repeal of former statutes .....	608

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#### ABBREVIATIONS USED IN THIS VOLUME.

C. C., Civil Code. P. C., Penal Code. C. C. P., Code of Civil Procedure. Pol. C., Political Code. Div., Division. Tit., Title. Chap., chapter. Art., article. Sec., section. Subd., subdivision.

CIVIL CODE  
OF THE  
STATE OF CALIFORNIA.  

---

IN FOUR DIVISIONS.



THE  
CIVIL CODE  
OF THE  
STATE OF CALIFORNIA.

---

AN ACT  
TO ESTABLISH A CIVIL CODE.

---

*The People of the State of California, represented in  
Senate and Assembly, do enact as follows :*

GENERAL DEFINITIONS AND DIVISIONS.

- SECTION 1. Title of Code.  
2. When to take effect.  
3. Definition of law.  
4. Action of sovereign power.  
5. The common law the rule of decision.  
6. Two kinds of common law.  
7. No common law, where the law is declared by this Code.  
8. Two kinds of civil rights.  
9. Rights, how modified.  
10. Divisions of this Code.

SECTION 1. This Act shall be known as the CIVIL CODE Title of Code  
OF THE STATE OF CALIFORNIA.

When to  
take effect.

SEC. 2. This Code shall take effect on the ——— day of ———, eighteen hundred and seventy-two, at twelve o'clock, noon.

N. Y. C. C., Sec. 2034.

Definition  
of law.

SEC. 3. Law is a rule of property and of conduct, prescribed by the supreme power of the State.

N. Y. C. C., Sec. 2.

Action of  
sovereign  
power.

SEC. 4. The will of the sovereign power is expressed—

1. By the Constitution, which is the organic Act of the people.

2. By statutes, which are the Acts of the Legislature, or by the ordinances of other and subordinate legislative bodies.

N. Y. C. C., Sec. 5.

The common  
law rule  
the rule of  
decision.

SEC. 5. The Common Law, as expressed in the decisions of the English and American Courts, and shown in the records, reports and digests thereof, is the rule of decision in all the Courts of this State.

[New section.] Stats. 1850, 219.

NOTE.—Our Act, adopting the common law of England (Stats. 1850, 219), is as follows:

"The common law of England, so far as it is not repugnant to, or inconsistent with, the Constitution of the United States or the Constitution or laws of the State of California, shall be the rule of decision in all the Courts of this State."

A strict construction of the words "common law of England," would have required Courts to follow the English rule, when in conflict with the American; yet it is believed that the latter has had a greater influence in our jurisprudence than the former. The phrase "common law which is expressed in the decisions of the English and American tribunals," extends the latter so as to include the whole body of the common law, whether found in English or American decisions, and makes it conformable to the construction of that Act.

COOL. BL. COMM., I, 87, note 3, is as follows:

"The common law includes those principles, usages and rules of action, applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the Legislature. (1 Kent, 468.) The common law of the American States consists of the common law of England, as modified by English statutes previous to the colonisation of America, so far as it has been found adapted to our altered condition and circumstances. And those English statutes passed afterwards, at any time prior to the Revolution, which were practically accepted and adopted in America, became also a part of American common law. (See Van Ness vs. Peckard, 2 Pet., 144; also, other authorities therein cited.)"

SEC. 6. The Common Law is divided into—

Two kinds of  
common law

1. Public law, or the law of nations.
2. Domestic or municipal law.

N. Y. C. C., Sec. 4.

NOTE.—Cool. Bl. Comm., I, 69, note 3, is as follows:

"Of the United States, as a nation, there is no common law. The Federal Government is composed of sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law would be made a part of our federal system only by legislative adoption. (McLean, J., in *Wheaton vs. Peters*, 8 Pet., 658, and other authorities therein cited.)"

SEC. 7. There is no Common Law in any case where the law is declared by this Code.

No common  
law, where  
the law is  
declared by  
this Code.

N. Y. C. C., Sec. 6.

SEC. 8. All original civil rights are either—

Two kinds of  
civil rights.

1. Rights of person; or,
2. Rights of property.

N. Y. C. C., Sec. 7.

SEC. 9. Rights of person and of property may be waived, surrendered or lost by neglect, in the cases provided by law.

Rights, how  
modified.

N. Y. C. C., Sec. 8; *Conkling vs. King*, 10 N. Y., 440.

SEC. 10. This Code has four general divisions:

Divisions of  
this Code.

1. The first relates to PERSONS.
2. The second, to PROPERTY.
3. The third, to OBLIGATIONS.
4. The fourth contains general provisions relating to PERSONS, PROPERTY and OBLIGATIONS.

N. Y. C. C., Sec. 9.





# **DIVISION FIRST.**

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**PART I. PERSONS.**

**II. PERSONAL RIGHTS.**

**III. PERSONAL RELATIONS.**

**IV. CORPORATIONS.**



# PART I.

## PERSONS.

### SECTION 17. Minors, who are.

18. Periods of minority, how calculated.
19. Adults, who are.
20. Status of minors, how changed.
21. Unborn child.
22. Persons made adults by other States, considered as such in this State, when domiciled herein.
23. Minors by the laws of other State or country, how considered in this State.
24. Persons of unsound mind.
25. Custody of minors.
26. Minors cannot give a delegation of power.
27. Cannot hold offices of trust; may of skill.
28. Contracts of minors made; disaffirmed.
29. When minor may disaffirm.
30. Cannot disaffirm contract for necessities.
31. Nor certain obligations.
32. Contracts of persons without understanding.
33. Contracts of other insane persons.
34. Powers of persons whose incapacity has been adjudged.
35. Minors liable for wrongs.
36. Not liable for exemplary damages.
37. Minors may enforce their rights.

### SEC. 17. Minors are:

1. Males under twenty-one years of age.
2. Females under eighteen years of age.

Minors, who are.

Stats. 1854, 155; Cool. Bl. Comm., I, 463; N. Y. C. C.,  
Sec. 10.

SEC. 18. The periods specified in the preceding section shall be calculated from the first minute of the day on which persons are born, to the same minute of the corresponding day completing the period of minority.

Periods of minority, how calculated.

[New section.] NOTE.—The first second of the *preceding* day is the common law rule. (Shars. Bl. Comm., I, 463 and note 11.)

### SEC. 19. All other persons are adults.

N. Y. C. C., Sec. 11.

Adults, who are.

Status of  
minors, how  
changed.

**SEC. 20.** The solemnization of marriage of minors, as provided by Sec. 74, changes their status from minors to adults.

[New section.]      Stats. 1858, 108.

**NOTE.**—The statute embraced only females ; this section extends the privilege to males.

Unborn  
child.

**SEC. 21.** A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests, in the event of its subsequent birth.

N. Y. C. C., Sec. 12 ; Cool. Bl. Comm., I, 128.

Persons  
made adults  
by other  
states, con-  
sidered as  
such in this  
State, when  
domiciled  
herein.

**SEC. 22.** Persons made adults by the laws of a State or foreign country in which they were domiciled, are adults in this State when they become domiciled herein.

[New section.]      Story on Conflict of Laws, 52 ; Tyler on Infancy and Coverture, 35.

Minors by  
the laws of  
other State  
or country,  
how consid-  
ered in this  
State.

**SEC. 23.** Minors by the laws of another State or foreign country wherein they have been domiciled, are not deemed adults under this Code, so as to affect or alter their rights in relation to contracts made in such State or foreign country.

[New section.]      Story on Conflict of Laws, 69 ; 2 Kent, 234, note C.

Persons of  
unsound  
mind.

**SEC. 24.** Persons of unsound mind, within the meaning of this Code, are idiots, lunatics, imbeciles and habitual drunkards.

N. Y. C. C., Sec. 13.

Custody of  
minors.

**SEC. 25.** The custody of minors and persons of unsound mind is regulated by Part III of this Division.

N. Y. C. C., Sec. 14.

Minors can-  
not give a  
delegation  
of power.

**SEC. 26.** A minor cannot give a delegation of power.

N. Y. C. C., Sec. 15.

Cannot hold  
offices of  
trust ; may  
of skill.

**SEC. 27.** Minors cannot hold or exercise office which relates to the administration of justice or the custody of public money or property. They may hold and exercise those offices which require only skill and diligence.

[New section.]      Tyler on Infancy and Coverture, 37.

Contracts  
of minors  
made ; dis-  
affirmed.

**SEC. 28.** A minor may make a conveyance or other contract in the same manner as any other person, subject

only to his power of disaffirmance under the provisions of this Title, and to the provisions of the Title on *Marriage*.

N. Y. C. C., Sec. 16; *Magee vs. Walsh*, 18 Cal., 155.

SEC. 29. In all cases other than those specified by Secs. 30 and 31, the contract of a minor may, upon restoring the consideration to the party from whom it was received, be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards, or, in case of his death within that period, by his heirs or personal representatives.

When minor may disaffirm.

N. Y. C. C., Sec. 17; *Hastings vs. Dollarhide*, 24 Cal., 195.

SEC. 30. A minor, or a person of unsound mind of whatever degree, cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or for that of his family, entered into by him when not under the care of a parent or guardian able to provide for him.

Cannot disaffirm contract for necessities.

N. Y. C. C., Sec. 18.

SEC. 31. A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute.

Nor certain obligations.

N. Y. C. C., Sec. 19.

SEC. 32. A person entirely without understanding has no power to contract, except in the case mentioned in Sec. 30, unless expressly authorized by statute.

Contracts of persons without understanding.

N. Y. C. C., Sec. 20.

SEC. 33. A person of unsound mind, but not entirely without understanding, may make a conveyance or other contract, before his incapacity has been judicially determined, subject to rescission, as provided in the chapter on *Rescission*.

Contracts of other insane persons.

N. Y. C. C., Sec. 21.

SEC. 34. After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined.

Powers of persons whose incapacity has been adjudged.

N. Y. C. C., Sec. 22.

Minors liable  
for wrongs.

SEC. 35. A minor, or a person of unsound mind of whatever degree, is liable for a wrong done by him, in like manner with any other person.

N. Y. C. C., Sec. 23.

Not liable for  
exemplary  
damages.

SEC. 36. A minor or person of unsound mind cannot be subjected to exemplary damages, unless at the time of the act he was capable of knowing that it was wrongful.

N. Y. C. C., Sec. 24.

Minors may  
enforce their  
rights.

SEC. 37. A minor may enforce his rights by civil action or other legal proceedings, in the same manner as a person of full age, except that a guardian must be appointed to conduct the same.

N. Y. C. C., Sec. 25.

## PART II.

### PERSONAL RIGHTS.

#### SECTION 43. General personal rights.

44. Defamation, what.
45. Libel, what.
46. Slander, what.
47. What communications are privileged.
48. Protection to personal relations.
49. Right to use force.

SEC. 43. Besides the personal rights mentioned or recognized in the POLITICAL CODE, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

General personal rights.

There is no doubt that persistent public insults, *e. g.*, continually shouting at a person in the street, or even silently dogging him, are personal injuries, against which he ought to be protected. Why is not an act which the law admits almost to justify, certainly to mitigate, the crime of assault and battery, sufficient foundation for a civil action? Compare *Adams vs. Rivers* (11 Barb., 390), where an action for use of insulting words, by one standing in the highway in front of plaintiff's land, was sustained on the ground of the trespass involved in standing in the highway after being ordered to depart, for the malicious purpose evinced.

N. Y. C. C., Sec. 27.

#### SEC. 44. Defamation is effected by—

1. Libel.
2. Slander.

Defamation, what.

In all definitions of libel or slander at common law, malice is treated as a necessary ingredient. But in the absence of a proper notice for the publication, malice is conclusively presumed, and the publisher of a libel is responsible, although clearly free from actual malice (*Hunt vs. Bennett*, 19 N. Y., 173; *Lewis vs. Chapman*, 16 id., 269). In the definitions of both classes of defamation, therefore, the Commissioners omit the ingredient of malice, and consequently the rules concerning presumption of malice.

N. Y. C. C., Sec. 28.

SEC. 45. Libel is a false and unprivileged publication, by writing, printing, picture, effigy or other fixed repre-

Libel, what

sentation to the eye, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

The law of libel has passed, in the last hundred years, from one extreme to another; from excessive severity to excessive laxity. The abuse of the freedom of the press, not only in the wantonness of its attacks upon public men, but in its assaults upon private citizens, has become so great, that a remedy for the evil must be sought or violence will take the place of law. The license into which this freedom has degenerated leads, not only to the frequent invasion of private rights, but to the corruption of public morals. If the Commissioners had been certain of the true remedy, they would have proposed it in the text of the Code. They will venture only to suggest that a more certain punishment for wanton or careless defamation being needed, a remedy may perhaps be found in affixing to it a penalty, to be recovered in every civil action for libel, in addition to the damages which the jury may find. This would at least render it unsafe for libelers to rely upon the caprice or prejudice of juries as the means of escape with nominal damages. Requiring the name of the writer to be signed to every personal article, might also have a salutary effect. If the Legislature should think these provisions desirable, two sections like the following would answer the purpose :

Sec. —. Any article published in a newspaper, containing matter which would be libellous if it were false, must be signed by the writer, and his name must be published at the foot of the article. A violation of this section is a misdemeanor.

Sec. —. In every civil action for libel, if the plaintiff recovers a verdict, he shall be entitled to judgment against the defendant for ——— dollars, as a penalty, in addition to the damages found by the jury, and the costs of the action.

N. Y. C. C., Sec. 29; Cool. Bl. Comm., I, 133; ib., III, 125; Thrall vs. Smiley, 9 Cal., 530; Maynard vs. Fireman's Fund Insurance Co., 34 Cal., 48.

Slander,  
what.

Sec. 46. Slander is a false and unprivileged publication, other than libel, which—

1. Charges any person with crime, or with having been indicted, convicted or punished for crime.

2. Imputes in him the present existence of an infectious, contagious or loathsome disease.

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit.

4. Imputes to him impotence or a want of chastity; or,

5. Which, by natural consequence, causes actual damage.



N. Y. C. C., Sec. 30; Cool. Bl. Comm., I, 153; ib., III, 123; *McDaniel vs. Baca*, 2 Cal., 326; *Butler vs. Howes*, 7 Cal., 87; *Bradley vs. Gardner*, 10 Cal., 371; *Scott vs. Harbor*, 18 Cal., 704.

Sec. 47. A privileged publication is one made—

1. In the proper discharge of an official duty.
2. In testifying as a witness, in any proceeding authorized by law, to a matter pertinent and material, or in reply to a question allowed by the tribunal.
3. In a communication, without malice, to a person interested therein, by one who was also interested, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive innocent, or who was requested by him to give the information.
4. By a fair and true report in a newspaper, without malice, of a judicial, legislative or other public official proceeding, or of anything said in the course thereof.

What communications are privileged.

N. Y. C. C., Sec. 31.

Sec. 48. The rights of personal relation forbid—

1. The abduction of a husband from his wife, or of a parent from his child.
2. The abduction or enticement of a wife from her husband, of a child from a parent, or from a guardian entitled to its custody, or of a servant from his master.
3. The seduction of a wife, daughter, orphan sister or servant.
4. Any injury to a servant, which affects his ability to serve his master.

Protection to personal relations.

N. Y. C. C., Sec. 32; Cool. Bl. Comm., III, 138, 141.

Sec. 49. Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent or other relative to the third degree, a ward, servant or master.

Right to use force.

N. Y. C. C., Sec. 33.



# PART III.

## PERSONAL RELATIONS.

### TITLE I. MARRIAGE.

#### II. PARENT AND CHILD.

#### III. GUARDIAN AND WARD.

#### IV. MASTER AND SERVANT.

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## TITLE I. .

### MARRIAGE.

#### CHAPTER I. THE CONTRACT OF MARRIAGE.

##### II. DIVORCE.

##### III. HUSBAND AND WIFE.

---

## CHAPTER I.

### THE CONTRACT OF MARRIAGE.

#### ARTICLE I. VALIDITY OF MARRIAGE.

##### II. AUTHENTICATION OF MARRIAGE.

---

## ARTICLE I.

### VALIDITY OF MARRIAGE.

#### SECTION 55. What constitutes marriage.

##### 56. Minors capable of contracting marriage.

##### 57. Marriage, how manifested and proved.

##### 58. When void.

##### 59. Incompetency of parties to.

##### 60. Of whites and negroes or mulattoes, void.

##### 61. Polygamy forbidden.

##### 62. Pardon does not restore marital rights.

##### 63. Marriage contracts subject to the same rules as other contracts.

##### 64. Marriage contracted without the State.

What constitutes marriage.

**SEC. 55.** Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, as provided in Sec. 74, or by a mutual assumption of marital rights, duties or obligations.

[New section.]

Const. of Cal., Art. XI, Sec. 12; "Marriage," Sec. 1; Cool. Bl. Comm., I, 433 and note 2, and 437; *Graham vs. Bennett*, 2 Cal., 503; *Letters vs. Cady*, 10 Cal., 533.

**NORM.**—In *Graham vs. Bennett*, above cited, it is held that "an open avowal of the intention, and an assumption of the relative duties which it imposes on each other, is sufficient to render it valid and binding."

As to whether consent alone constitutes marriage: In *Jewell's Heirs vs. Jewell* (1 How., 219) the Court was equally divided. In *Regina vs. Millis* (10 Jeb. and Fin., 534) the House of Lords, on appeal from Ireland, was also equally divided on the same question—Lords Brougham, Denman and Campbell in favor, and Lords Lynhurst, Coltenham and Abinger against it. On reference of the question to the Court, Tindal, C. J., gave the unanimous opinion of the Court that it was *not* a valid marriage, and held "that by the law of England, as it existed at the time of the Marriage Act, a contract of marriage *per verba de præcænti* was indissoluble between the parties themselves, and afforded to either of them, by application to the spiritual Court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. The civil contract and the religious ceremony were both necessary to a perfect marriage by the common law." (*Parsons on Contracts*, p. 78 and notes.)

The declaration of marriage and actions to establish marriage, provided for in this chapter, correspond to this right of solemnization.

Secs. 34 and 37 of the New York Civil Code are as follows:

"SEC. 34. Marriage is a personal relation, arising out of a civil contract, to which the consent of parties capable of making it is alone necessary.

"SEC. 37. The consent to a marriage must be to one commencing instantly, and not to an agreement to marry afterwards."

Minors capable of contracting marriage.

**SEC. 56.** Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage.

N. Y. C. C., Sec. 36; Cool. Bl. Comm., I, 435.

**NOTE.**—Our statute provides that “no person shall be joined in marriage unless they shall have first obtained a license,” which must show proper age, consent, etc. Upon this class of statutes, Parsons on Contracts says: “The English statute makes the marriage of minors, without such consent, absolutely void. In this country, that would depend upon the statutes of the several States. Generally, if not universally, the marriage would be held valid, although the person celebrating it might be punishable,” and cites *Parton vs. Hervey*, 1 Gray, 119.

The Commission dare not make serious changes affecting the law of marriages, yet it would seem that to permit boys and girls, fourteen and twelve years old, to become husband and wife, without the consent of parents or guardians, and take upon themselves all the responsibilities which belong to that relation, and, through it, to society, is so shocking to common sense and popular judgment, and so dangerous to the well-being of the parties themselves, that some better limit ought to be established. Either raise the age of consent to fifteen and eighteen, or make the marriage *absolutely void*, if consummated without the consent of parents or guardians, or a Probate Court.

The civil law made naked consent to constitute marriage, yet that included the consent of parents or tutors, without which the marriage was void. France has in a measure retained this law, requiring all males under twenty-five and all females under twenty-one to obtain the consent of parents or guardians before contracting marriage.

It is substantially the same in Holland. English statutes make such marriage void. But by 19 and 20 Vic., Chap. 119, Sec. 17, they are valid if *actually solemnized* without consent. (Cool. Bl. Comm., 437 and note 12.)

**FINAL NOTE.**—In final review, the Commission has concluded to raise the ages of consent to *fifteen* in females and *eighteen* in males.

**Sec. 57.** Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases. Cohabitation, admissions of the parties, general reputation, being received as husband and wife in society, public houses or private families, and all other pertinent circumstances, are competent evidence to prove marriage.

Marriage,  
how mani-  
fested and  
proved.

[New section.] *People vs. Anderson*, 26 Cal., 129; Parsons on Contracts, p. 77 and note; *Starr vs. Peck*, 1 Hill, p. 270; *Clayton vs. Wardell*, 4 N. Y., 230; *Case vs. Case*, 17 Cal., 598.

**NOTE.**—Sec. 35, New York Civil Code, is as follows: “Consent to a marriage may be manifested in any form, and may be proved like any other fact.”

When void.

SEC. 58. If either party to a marriage is incapable of consent for want of age or understanding, or is incapable, from physical cause, of entering into the marriage state, or if the consent of either is obtained by fraud or force, the marriage is void.

N. Y. C. C., Sec. 39; Cool. Bl. Comm., I, 435.

NOTE.—This is the rule in *Graham vs. Bennett* (2 Cal., 503), but *contra* in *Baker vs. Baker* (13 Cal., 87). Fraud "vitiat it *ab initio*, and authorizes a divorce."

The above note was appended to the section as first printed—taken from the New York Civil Code, which avoided the marriage from date of decree.

Incompetency of parties to.

SEC. 59. Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as of the whole blood, are incestuous, and void from the beginning; whether the relationship is legitimate or illegitimate.

N. Y. C. C., Sec. 38; "Marriage," Sec. 2.

Of whites and negroes or mulattoes void.

SEC. 60. All marriages of white persons and negroes or mulattoes are illegal and void.

"Marriage," Sec. 3.

Polygamy forbidden.

SEC. 61. A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless—

1. The former marriage had been annulled or dissolved for some cause other than the adultery of such person; or,

2. Unless such former husband or wife had been finally sentenced to imprisonment for life; or,

3. Unless such former husband or wife was absent, and not known to such person to be living, for the space of five successive years immediately preceding such subsequent marriage; in which case the subsequent marriage is void only from the time its nullity is adjudged by a competent tribunal.

N. Y. C. C., Sec. 40; Cool. Bl. Comm., I, 435; *Bowers vs. Bowers*, 9 N. Y. Lg. Ols.

Pardon does not restore marital rights.

SEC. 62. No pardon granted to any person sentenced to imprisonment for life in this State, restores such person to the rights of any previous marriage, or to the guardianship of any issue of such marriage.

N. Y. C. C., Sec. 41.

SEC. 63. A promise of marriage is subject to the same rules as contracts in general, except that neither party is bound by a promise made in ignorance of the other's want of personal chastity, and that either is released therefrom by unchaste conduct on the part of the other.

Marriage contracts, subject to the same rules as other contracts.

N. Y. C. C., Sec. 44.

SEC. 64. All marriages contracted without this State, which would be valid by the laws of the country in which the same were contracted, shall be valid in this State.

Marriage contracted without the State.

"Marriage," Sec. 5.

## ARTICLE II.

### AUTHENTICATION OF MARRIAGE.

SECTION 68. Marriage, how solemnized.

69. Marriage license.
70. By whom solemnized.
71. No particular form of solemnization.
72. Substantial requisites.
73. Certificate of marriage.
74. Certificate to parties and Recorder.
75. Declaration of marriage, how made.
76. Action to affirm unsolemnized marriages.

SEC. 68. Marriage must be licensed, solemnized, authenticated and recorded as provided in this article; but non-compliance with its provisions does not invalidate any lawful marriage, but subjects the offenders to the penalty prescribed in the PENAL CODE.

Marriage, how solemnized.

SEC. 69. All persons about to be joined in marriage must first obtain a license therefor from the Clerk of the County Court of the county in which the marriage is to be celebrated, showing—

Marriage license.

1. The identity of the parties.
2. Their real and full names and places of residence.
3. That they are of sufficient age to be capable of contracting marriage.
4. If the male is under the age of twenty-one, or the female under the age of eighteen years, the consent of the father, mother or guardian, if any such is given; or that such non-aged person has been previously but is not at the time married.

For the purpose of ascertaining these facts, the Clerk is

authorized to examine parties and witnesses on oath, and receive and read affidavits. He shall state such facts in the license.

"Marriage," Sec. 7; N. Y. C. C., Sec. 47.

By whom  
solemnized.

SEC. 70. Marriage must be solemnized by either a Supreme, District or County Judge, Justice of the Peace, Mayor, priest, or minister of the gospel of any denomination.

"Marriage," Sec. 7; N. Y. C. C., Sec. 45.

No particular  
form of  
solemnization.

SEC. 71. No particular form for the ceremony of marriage is required, but the parties must solemnly declare, in the presence of the person solemnizing the marriage, and of at least one witness, that they take each other as husband and wife.

N. Y. C. C., Sec. 46.

Substantial  
requisites.

SEC. 72. The person solemnizing a marriage must first require the presentation of the marriage license, and satisfy himself that it substantially conforms to Sec. 69, and that the facts set forth in it are true. For this purpose he may rely upon the license or may administer oaths and examine the parties and witnesses in like manner as the County Clerk, before issuing the license.

[New section.] Based on "Marriage," Secs. 7, 8.

NOTE.—Sec. 47, New York Civil Code, changed to conform to our license system. It is also intended to give authority to revise the license of the Clerk in cases where there are suspicions of fraud.

Certificate of  
marriage.

SEC. 73. The person solemnizing a marriage must make, sign and indorse upon or attach to the license a certificate, showing—

1. That he believes the facts stated to be true, and that upon due inquiry there appears to be no legal impediment to the marriage.

2. The names and places of residence of one or more witnesses to the ceremony.

3. The fact, time and place of solemnization.

[New section.] Based on "Marriage," Sec. 8.

Certificate to  
parties and  
Recorder.

SEC. 74. He must, at the request of and for either party, make a certified copy of the license and certificate, and file the originals with the County Recorder within



thirty days after the marriage, which must be recorded as provided in Sec. —, POLITICAL CODE.

[New section.] Based on "Marriage," Sec. 8.

SEC. 75. Persons married under the provisions of Sec. 55, and without the solemnization as provided in Sec. 70, must jointly make a declaration of marriage, showing—

Declaration  
of marriage,  
how made.

1. The names, ages and residence of the parties.

2. The time of marriage, as nearly as practicable.

3. That the marriage has not been solemnized as required by Sec. 70.

It must be signed by the parties making it, and acknowledged in like manner as conveyances of land by the husband, and filed with the County Recorder, to be recorded in like manner as solemnized marriages.

[New section.] NOTE.—The following section for the Penal Code has been prepared, as a means of enforcing compliance with the preceding:

"If persons who are married under the provisions of Sec. 55, and whose marriage is not solemnized as provided in Sec. —, shall not make, acknowledge and file with the County Recorder a declaration of marriage as provided in Sec. 70, within one year after such marriage, dating from the consent thereto, they are guilty of a misdemeanor. If one party to the marriage consents and proposes to make the declaration and the other refuses or neglects to make it, the party refusing or neglecting is alone guilty of the offence provided for in this section."

SEC. 76. If either party to an unsolemnized marriage refuses to join in a declaration of marriage, as provided in Sec. 75, the other party may institute an action in the District Court for the purpose of establishing the marriage, and upon a proper showing, and by proceedings provided in the CODE OF CIVIL PROCEDURE, shall obtain a judgment affirming the validity of such marriage.

Action to  
affirm un-  
solemnized  
marriages.

[New section.] NOTE.—These two sections and penal section in note are substitutes for the vicious proviso at the end of Sec. 7 (Stats. 1863, 244). They are intended, with the penal section, equally for the protection of the parties to a marriage and society. Families and the public have a right to know who are married, though they may not always know who are living in illicit intercourse. See note to Sec. 55 for the English provision for enforcing the solemnization of marriage.

## CHAPTER II.

## DIVORCE.

## ARTICLE I. NULLITY.

## II. DISSOLUTION.

## III. CAUSES FOR DENYING DIVORCE.

## IV. GENERAL PROVISIONS.

## ARTICLE I.

## NULLITY.

## SECTION 82. Cases where marriage may be annulled.

83. Action to obtain decree of nullity in certain cases, when and by whom commenced.

84. Children of annulled marriage.

85. Custody of children.

86. Effect of judgment of nullity.

Cases where  
marriage  
may be an-  
nulled.

SEC. 82. A marriage may be annulled for any of the following causes, existing at the time of the marriage:

1. That the party seeking to have the marriage annulled was under the age of legal consent; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife.

2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force.

3. That either party was of unsound mind, unless such party, after coming to reason, freely cohabited with the other as husband or wife.

4. That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife.

5. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife.

6. That either party was, at the time of marriage, physically incapable of entering into the married state; and such incapacity continues, and appears to be incurable.

N. Y. C. C., Sec. 54; 1 Cool. Bl. Comm., 435-440. Antenuptial fraud, *Baker vs. Baker*, 13 Cal., 87. Previous marriage, *Fuller vs. Fuller*, 17 Cal., 605.

**NOTE.**—Subd. 3 of Sec. 54 (N. Y. C. C.), and Subd. 2 Sec. 4, "Divorces" (Statutes), are substantially the same. They both provide for nullity of marriage of females married under fourteen, without consent of parents or guardians. The provision is omitted, as being in conflict with the recognized capacity to contract marriage at twelve years of age.

**SEC. 83.** An action to obtain a decree of nullity of marriage, for causes mentioned in the preceding section, must be commenced within the periods, and by the parties, as follows :

Action to obtain decree of nullity in certain cases, when and by whom commenced.

1 For causes mentioned in Subd. 1: by either party to the marriage, or by a guardian or relative, within five years after arriving at the age of consent.

2. For causes mentioned in Subd. 2: by the party injured, within five years after discovering the fact of previous marriage; or by the former husband or wife, within five years after discovering the fact of subsequent marriage.

3. For causes mentioned in Subd. 3: by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party.

4. For causes mentioned in Subd. 4: by the party injured, within five years after the discovery of the facts constituting the fraud.

5. For causes mentioned in Subd. 5: by the injured party, within five years after the marriage.

6. For causes mentioned in Subd. 6: by the injured party, within five years after the marriage.

[New section.] Based on N. Y. C. C., Sec. 55.

**SEC. 84.** Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or where a marriage is annulled on the ground of insanity, children begotten before the judgment must be specified in the judgment, and are entitled to succeed, in the same manner as legitimate children, to the estate of the parent who, at the time of the marriage, was competent to contract.

Children of annulled marriages.

N. Y. C. C., Sec. 56.

Custody of  
children.

. SEC. 85. The Court must award the custody of the children of a marriage annulled on the ground of fraud or force, to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party.

N. Y. C. C., Sec. 57.

Effect of  
judgment  
of nullity.

SEC. 86. A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them.

N. Y. C. C., Sec. 58.

## ARTICLE II.

### DISSOLUTION OF MARRIAGE.

#### SECTION 90. Marriage, how dissolved.

91. Divorce, what.
92. Causes for divorce.
93. Adultery defined.
94. Extreme cruelty, what.
95. Desertion, what.
96. Desertion, how manifested.
97. In case of stratagem or fraud, who commits desertion.
98. In case of cruelty, where one party leaves the other, who commits desertion.
99. Separation by consent not desertion.
100. Intent not to be inferred.
101. Separation and intent to desert not always coincident.
102. Consent to separate revocable.
103. Desertion, how cured. Effect of refusing condonation.
104. Wife must abide by husband's selection of home, or it is desertion on her part.
105. If the place is unfit, and wife refuses to conform, it is desertion by the husband.
106. Wilful neglect, what.
107. Habitual intemperance, what.
108. Felony, what.

Marriage,  
how dis-  
solved.

#### SEC. 90. Marriage may be dissolved—

1. By the death, or sentence to imprisonment for life, of either of the parties; or,
2. By a divorce adjudged by a Court of competent jurisdiction.

N. Y. C. C., Sec. 59.

Divorce,  
what

SEC. 91. Divorce is a judgment dissolving the marriage and restoring the parties to the status of unmarried persons.

[New section.]

SEC. 92. Divorces must be granted for any of the following causes: Causes for divorce.

1. Adultery.
2. Extreme cruelty.
3. Wilful desertion.
4. Wilful neglect to provide for the wife.
5. Habitual intemperance.
6. Conviction of felony.

[New section.] Based on "Divorces," Sec. 4.

SEC. 93. Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. Adultery defined.

[New section.] Bouv. Law Dict., "Adultery," p. 92.

SEC. 94. Extreme cruelty is such conduct in one of the married parties as renders a continuance of the cohabitation either so dangerous to the other in fact, or attended with such reasonable apprehension in the mind of danger to the physical existence or comfort, as to demand a separation on the ground of the real physical safety of the other; or of the mental and physical capacity in the other to discharge well the duties of husband or wife. Extreme cruelty, what

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 717; Stats. 1851, 186; 1870, 291; Powelson vs. Powelson, 22 Cal., 358; Mahone vs. Mahone, 19 Cal., 626; Morris vs. Morris, 14 Cal., 76; Johnson vs. Johnson, 14 Cal., 459.

NOTE.—Statutes of 1851, 186, authorizes divorce for "extreme cruelty;" of 1870, 291, for "extreme cruelty by inflicting upon the other grievous bodily injury or mental suffering." Mr. Bishop, in his work above cited, has made three exhaustive trials to define the term; one in his first edition, another in the third, and a final in the fourth. The final has been adopted as Sec. 94.

SEC. 95. Wilful desertion is the voluntary separation one year of one of the married parties from the other, or the voluntary refusal one year to renew a suspended cohabitation without justification either in the consent or the wrongful conduct of the other. The fact of separation and the intent to desert must coexist. Desertion, what.

[New section.] Bish. on Mar. and Div., I, Sec. 776; Stats. 1851, 186; 1870, 291; Conant vs. Conant, 10 Cal., 249; Hardenburg vs. Hardenburg, 14 Cal., 654; Morrison vs. Morrison, 20 Cal., 431; Benkert vs. Benkert, 32 Cal., 467.

Desertion,  
how mani-  
fested.

**SEC. 96.** Wilful desertion may be manifested by—

1. Persistent refusal to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary; or,
2. Refusal of the deserting party to dwell in the same house with the other party, when there is no just cause for such refusal; or,
3. Prolonged voluntary absence without apparent cause.

[New section.]      Bish. on Mar. and Div. (4th ed.), Sec. 777, and note;  
Morrison vs. Morrison, 20 Cal., 231.

**NOTE.**—Subd. 1 is intended to settle a question stated as doubtful in Bishop on Marriage and Divorce (4th ed.), 778-782. It reaches a class of cases not covered by the second subdivision. The term "matrimonial intercourse" is used as a more agreeable expression than "sexual intercourse," both having the same legal significance, according to authorities cited in note 1, Sec. 777, of the work above cited. Use of the word *cohabited* is avoided for its uncertainties. See same work.

In case of  
stratagem or  
fraud, who  
commits  
desertion.

**SEC. 97.** When one party is induced, by the stratagem or fraud of the other party, to leave the family dwelling place, or to be absent, and during such absence the offending party departs with intent to desert the other, it is desertion by the party committing the stratagem or fraud, and not by the other.

[New section.]      Bish. on Mar. and Div., Sec. 784.

In case of  
cruelty,  
where one  
party leaves  
the other,  
who commits  
desertion.

**SEC. 98.** Departure or absence of one party from the family dwelling place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but it is desertion by the other party.

[New section.]      **NOTE.**—This section is intended to settle a question discussed as doubtful in Bishop on Marriage and Divorce, Secs. 787, 791, 794.

Separation  
by consent  
not deser-  
tion.

**SEC. 99.** Separation by consent, with or without the understanding that one of the parties will apply for divorce, is not desertion.

[New section.]      Bish. on Mar. and Div. (4th ed.), Sec. 783.

Intent not to  
be inferred.

**SEC. 100.** Intent to desert cannot be inferred from the naked fact of living apart, but such fact, accompanied by

other circumstances or prolonged voluntary absence without apparent cause, may establish the intent.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 783.

SEC. 101. The separation and intent to desert are not always coincident. Temporary absence or separation, proper in itself, may be converted into desertion whenever the intent to desert is fixed during such absence or separation.

Separation and intent to desert not always coincident.

[New section.] Bish. on Mar. and Div., Sec. 784.

SEC. 102. Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration but the other refuses it, such refusal is desertion.

Consent to separate revocable.

[New section.] Bish. on Mar. and Div., Sec. 786.

SEC. 103. If one party deserts the other, and before the expiration of the statutory period required to make the desertion complete, truly repents, returns and offers, in good faith, to fulfil the marriage contract, and solicits condonation, the desertion is cured. If the other party refuses such offer and condonation, it is desertion by such party from the time of refusal.

Desertion, how cured.

Effect of refusing condonation.

[New section.] Bish. on Mar. and Div., Sec. 786; Benkert vs. Benkert, 32 Cal., 467.

SEC. 104. The place and mode of living should be mutually agreed upon by the parties, but if they fail to agree the husband may choose any reasonable place or mode, as provided in Sec. 156, and if the wife does not conform thereto, it is desertion.

Wife must abide by husband's selection of home, or it is desertion on her part.

[New section.] Bish. on Mar. and Div., Sec. 788; N. Y. C. C., Secs. 75, 76; Hardenburg vs. Hardenburg, 14 Cal., 654.

SEC. 105. If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband, from the time her reasonable objections are made known to him.

If the place is unfit, and wife refuses to conform, it is desertion by the husband.

[New section.]

SEC. 106. Wilful neglect is the neglect of the husband, for one year, to provide for his wife the common necessities of life, having the ability to provide them, or failing

Wilful neglect, what.

to do so by reason of his idleness, profligacy or dissipation.

[New section.]      Stats. 1870, 291; Washburn vs. Washburn, 9 Cal., 475.

Habitual  
intemper-  
ance, what.

SEC. 107. Habitual intemperance is that degree of intemperance, for one year, from the habitual use of intoxicating drinks, which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party.

[New section.]      Stats. 1851, 186; 1870, 291; Mahone vs. Mahone, 19 Cal., 626; Bish. on Mar. and Div. (4th ed.), Sec. 813.

NOTE.—The last clause of the section is *new*. It speaks for itself. The presence of an habitual drunkard *at home*, casting reproaches and indignities upon his wife, *ought* to be a better cause of divorce than being drunk at his place of business.

Felony,  
what.

SEC. 108. Felony, as a ground of divorce, is a crime for which the judgment or sentence is imprisonment in the State Prison for a period less than for life. Sentence for a life period dissolves the marriage by operation of law.

[New section.]

### ARTICLE III.

#### CAUSES FOR DENYING DIVORCE.

SECTION 112. Divorces denied, on showing what.

113. Connivance, what.

114. Corrupt consent, how manifested.

115. Collusion, what.

116. Condonation, what.

117. Requisites to condonation.

118. Evidence of condonation.

119. Condonation, when operates to bar divorce.

120. Concealment of facts in certain case makes condonation void.

121. Condonation, how revoked.

122. Recrimination, what.

123. Condonation in a recriminatory defence a bar to such defence, when.

124. Divorces denied, when.

125. Lapse of time establishes certain presumptions.

126. Presumptions may be rebutted.

127. Limitation of time.

128. Divorces granted, when.



SECTION 129. Proof of actual residence required. Presumptions do not apply.

130. Additional rules of practice in divorce cases.

131. Additional affirmative statements required in complaint.

132. Divorce not to be granted by default, etc.

SEC. 112. Divorces must be denied upon showing—

1. Connivance; or,
2. Collusion; or,
3. Condonation; or,
4. Recrimination; or,
5. Limitation and lapse of time.

Divorces  
denied, on  
showing  
what.

[New section.]      Bish. on Mar. and Div., Secs. 28, 36, 74.

SEC. 113. Connivance is the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce.

Connivance,  
what.

[New section.]      Bish. on Mar. and Div. (4th ed.), Sec. 5.

SEC. 114. Corrupt consent is manifested by passive permission with intent to connive at or actively procure the commission of the acts complained of.

Corrupt con-  
sent, how  
manifested.

[New section.]      Bish. on Mar. and Div. (4th ed.), Sec. 6.

SEC. 115. Collusion is an agreement between husband and wife, that one of them shall commit, or appear to have committed, or to be represented in Court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce.

Collusion,  
what.

[New section.]      Bish. on Mar. and Div. (4th ed.), Sec. 28.

SEC. 116. Condonation is the conditional forgiveness of a matrimonial offence constituting a cause of divorce.

Condonation,  
what.

[New section.]      Benkert vs. Benkert, 32 Cal., 467.

SEC. 117. The following requirements are necessary to condonation:

Requisites to  
condonation.

1. A knowledge on the part of the condonor of the facts constituting the cause of divorce.

2. Reconciliation and remission of the offence by the injured party.

3. Restoration of the offending party to all marital rights.

4. An implied condition subsequent, that the forgiving party shall be treated with conjugal kindness.

[New section.]      Bish. on Mar. and Div., Secs. 53, 71

Evidence of  
condonation.

SEC. 118. Where the cause of divorce consists of a course of offensive conduct covering the prescribed statutory period, or arising, in case of cruelty, from successive acts of ill treatment which may, aggregately, constitute the offence, cohabitation, or passive endurance, or conjugal kindness, shall not be evidence of condonation of any part of the facts or period constituting such causes, unless accompanied by an express agreement to condone.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 50.

Condonation, when  
operates to  
bar divorce.

SEC. 119. In cases mentioned in the last section, only after the cause of divorce has become complete, as to the acts complained of and the period of their continuance, can condonation be made that will operate to bar divorce or exclude evidence covering any portion of the acts or time relied upon to constitute the cause. Even in such cases, further efforts to live with and reform the offending party must not, unsupported by an express agreement of condonation made without undue influence, be construed as evidence of condonation.

[New section.] Bish. on Mar. and Div. (4th ed.), Sec. 63, "Though such party might be willing to give the other a fair trial of future matrimonial fidelity, if sure of retaining his remedy," yet would not, if the remedy was in danger of being lost in such trial.

Concealment  
of facts in  
certain case  
makes con-  
donation  
void.

SEC. 120. A fraudulent concealment, by the condonee, of facts constituting a different cause of divorce from the one condoned, and existing at the time of condonation, makes void such condonation.

Bish. on Mar. and Div. (4th ed.), Secs. 65, 66; Dempster vs. Dempster, 2 Swab. & T., 438, 44.

Condonation, how  
revoked.

SEC. 121. Condonation is revoked, and the original cause of divorce revived—

1. When the condonee commits acts constituting a like or other cause of divorce; or,

Palmer vs. Palmer, 2 Swab. & T., 61, 62; Bish. on Mar. and Div., Sec. 64.

2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith or not fulfilled.

Bish. on Mar. and Div., Sec. 53; *Durant vs. Durant*, 1 Hag. Ec., 773, 3 Eng. Ec., 310; *D'Aguilar vs. D'Aguilar*, 1 Hag. Ec., 773, 3 Eng. Ec., 329; *Bramwell vs. Bramwell*, 3 Hag. Ec., 618; *Johnson vs. Johnson*, 4 Paige, 460; *Benkert vs. Benkert*, 32 Cal., 467.

NOTE.—As to Subd. 2, Mr. Bishop, above cited, says: "The difference of opinion among judges and lawyers relate to the latter [this] branch of the proposition." It is best to settle the question.

SEC. 122. Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.

Recrimination, what.

[New section.] 2 Bish. on Mar. and Div., Sec. 75.

NOTE.—This simple section settles many conflicting points arising from the practice of leaving with the Courts a wide discretion as to what degree of bad conduct or what degree of proof of causes of divorce shall be required when they are shown in recrimination, or whether unlike causes of divorce can be so shown.

SEC. 123. Condonation of a cause of divorce shown in the answer as a recriminatory defence is a bar to such defence when the condonee has fully performed the marital duties, and is without reproach since the condonation; or, if three years or more has elapsed after the condonation and before the accruing or completion of the cause of divorce, against which the recrimination is shown.

Condonation in a recriminatory defence a bar to such defence, when.

[New section.] Bish. on Mar. and Div., Secs. 97-100.

NOTE.—The difficulty of this subject will be better comprehended by reading the sections above cited. It would seem better to have some rule, even if it sometimes works a hardship, than to have confusion arising from deciding each case upon its own merits.

SEC. 124. A divorce must be denied—

Divorces denied, when.

1. When the cause is adultery and the action is not commenced within five years after the commission of the act of adultery, or after its discovery by the injured party; or,

2. When the cause is conviction of felony, and the action is not commenced before the expiration of one year after the termination of the period of sentence.

3. In all other cases, when there is an unreasonable

lapse of time after the commission of the offence and before the commencement of the action.

[New section.]

Lapse of time establishes certain presumptions.

SEC. 125. Lapse of time is such an unreasonable delay in commencing the action as establishes the presumption that there has been connivance, collusion in or condonation of the offence, or full acquiescence in the same, with intent to continue the marriage relation notwithstanding the commission of such offence.

[New section.]      Bish. on Mar. and Div. (4th ed.), Sec. 108.

Presumptions may be rebutted.

SEC. 126. The presumptions arising from lapse of time may be rebutted by showing reasonable grounds for the delay in commencing the action.

[New section.]      Bish. on Mar. and Div. (4th ed.), Sec. 106.

Limitation of time.

SEC. 127. There are no limitations of time for commencing actions for divorce, except such as are contained in Sec. 124. The provisions of the CODE OF CIVIL PROCEDURE do not apply to actions for divorce, so far as they relate to the limitations of such actions.

[New section.]      **NOTE.**—At present there is no specific limitation in divorce cases. The only statute upon the subject is the Act of 1850 (Stats. 1850, 343), as follows :

“An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.”

The New York Civil Code provides four years limitation in cases of adultery. Upon a careful examination of the laws of the different States upon the subject, it appears very difficult to establish any exact rule of time, however desirable such a rule might be. There are so many instances of efforts at reformation—so much waiting and hoping before finally attempting to break, judicially, the marriage relation—that any arbitrary rule which would force the party to commence an action or lose the remedy, would defeat the discharge of the most Christian duties arising from the relation or deprive the party of all relief when all efforts fail. This section (lapse of time) is substantially the present English statute, as expanded by rules which have been established by the Courts in its construction.

See *Pellew vs. Pellew*, 1 Swab. and Trist., p. 553 ; also, *Matthews vs. Matthews*, 1 Swab. and Trist., p. 499.

Divorces granted, when.

SEC. 128. A divorce must be granted only—

1. When the marriage took place in this State ; or,
2. When both husband and wife were actual inhabitants

of this State at the time of the commission of the acts constituting the cause of divorce; or,

3. When the injured party, at the time of the commission of the acts and at the commencement of the action, was an actual inhabitant of this State; or,

4. When the acts were committed in this State, and the injured party, at the commencement of the action, was an actual inhabitant of this State; or,

5. When the plaintiff has been an actual inhabitant of this State one year next preceding the commencement of the action, and the cause of divorce is extreme cruelty, wilful neglect, wilful desertion or habitual intemperance, and any part of the course of conduct or statutory period of time required to make the offence complete, has occurred or elapsed in this State and a part in another State.

*NOTE.*—New York Civil Code, Sec. 60. First paragraph omitted, the rest enlarged to extend to all cases, instead of being limited to adultery. Subd. 5 is new.

SEC. 129. In actions for divorce, the presumption of law that the domicile of the husband is the domicile of the wife, does not apply. After separation, each may have a separate domicile, depending for proof upon actual residence and not upon legal presumptions.

*Proof of actual residence required. Presumptions do not apply.*

*Kashaw vs. Kashaw, 3 Cal., 312; N. Y. C.-C., Sec. 711; Bish. on Mar. and Div., Secs. 124-131.*

SEC. 130. The rules of practice in actions for divorce, are those embraced in the CODE OF CIVIL PROCEDURE, with the following additional requirements: When service of summons is made by publication, under the provisions of Secs. 411 and 412. CODE OF CIVIL PROCEDURE, the Court, before making the order for the publication of summons, must examine the plaintiff as to the residence of the defendant, and may require affidavits and make such further orders for the publication of summons in newspapers published at or near the place of marriage and of last domicile, as may be deemed necessary to secure notice to the defendant. No divorce shall be granted until proof is made of personal service on defendant or compliance with such orders of publication.

*Additional rules of practice in divorce cases.*

Additional  
affirmative  
statements  
required in  
complaint.

SEC. 131. In addition to the allegations of the complaint required by the CODE OF CIVIL PROCEDURE, the plaintiff must affirmatively state that there has been no connivance, collusion, condonation, recrimination, limitation nor lapse of time sufficient to bar the action. These statements are presumptively true; but the contrary being proved, a decree of divorce must be denied.

NOTE.—This section has been prepared on recommendation of Hon. S. H. Dwinelle, Judge of the Fifteenth District Court, to enable the Court to have a basis for denying divorce, where there is no answer filed. Both the preceding sections should be transferred to the Code of Civil Procedure before adoption by the Legislature.

Divorce not  
to be granted  
by default,  
etc.

SEC. 132. No divorce shall be granted upon the default of the defendant, or upon the statement, admission or uncorroborated testimony of the parties, or upon any statement or finding of fact made by a referee, but the Court must require proof of the facts alleged, which proof, if taken before a referee, must be upon written questions and answers.

"Divorces," Sec. 8; 13 Cal., 87.

#### ARTICLE IV.

##### GENERAL PROVISIONS.

SECTION 136. Relief may be adjudged in some cases, where separation is denied.

137. Expense of action.

138. Orders respecting custody of children.

139. Support of wife and children on divorce or separation granted to wife.

140. Security for maintenance and alimony.

141. Court shall resort to what, in executing certain sections.

142. If wife has sufficient for her support, Court may withhold allowance.

143. Common and separate property may be subjected to support and educate children.

144. When wife shall support husband out of her separate property.

145. Legitimacy of issue.

146. Same.

147. Disposition of common property on divorce.

148. How disposed of when divorce rendered on adultery as a cause.

149. Such an action subject to revision on appeal.

**Sec. 136.** Though judgment of divorce is denied, the Court may, in an action for divorce, provide for the maintenance of the wife and her children, or any of them, by the husband.

N. Y. C. C., Sec. 68.

Relief may be adjudged in some cases where separation is denied.

**Sec. 137.** While an action for divorce is pending, the Court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action.

N. Y. C. C., Sec. 71.

Expense of action.

**Sec. 138.** In an action for divorce, the Court may, before or after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper, and may at any time vacate or modify the same.

N. Y. C. C., Sec. 72.

Orders respecting custody of children.

**Sec. 139.** Where a divorce is granted for an offence of the husband, the Court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife, for her support during her life, or for a shorter period, as the Court may deem just, having regard to the circumstances of the parties respectively; and the Court may, from time to time, modify its orders in these respects.

N. Y. C. C., Sec. 73.

Support of wife and children on divorce or separation granted to wife.

**Sec. 140.** The Court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case.

N. Y. C. C., Sec. 74.

Security for maintenance and alimony.

**Sec. 141.** In executing the five preceding sections the Court must resort—

1. To the common property; then,
2. To the separate property of the husband.

[New section.]

Court shall resort to what, in executing certain sections.

**Sec. 142.** When the wife has either a separate estate or an interest in common property sufficient to give her

If wife has sufficient for her support, Court may withhold allowance.

alimony or a proper support, the Court, in its discretion, may withhold any allowance to her out of the separate property of the husband.

[New section.]

Common and separate property may be subjected to support and educate children.

SEC. 143. The common property of husband and wife, and the separate property of each, may be subjected to the support and education of the children in such proportions as the Court deems just.

[New section.]

When wife shall support husband out of her separate property.

SEC. 144. Either without divorce or with divorce, when the wife is the offending party she shall support the husband out of her separate property, when he has no separate estate and when they have no common property, and when he is not able or competent, from infirmities, to support himself.

[New section.]

Legitimacy of issue.

SEC. 145. When a divorce is granted for the adultery of the husband, the legitimacy of children of the marriage, begotten of the wife before the commencement of the action, is not affected.

N. Y. C. C., Sec. 62.

Same.

SEC. 146. When a divorce is granted for the adultery of the wife, the legitimacy of children begotten of her before the commission of the adultery is not affected; but the legitimacy of other children of the wife may be determined by the Court, upon the evidence in the case. In every such case, all children begotten before the commencement of the action are to be presumed legitimate until the contrary is shown.

N. Y. C. C., Sec. 63.

Disposition of common property on divorce.

SEC. 147. In case of the dissolution of the marriage by decree of any Court of competent jurisdiction, the common property must be equally divided between the parties, and the Court granting the decree must make such order for the division of the common property, or the sale and equal distribution of the proceeds thereof, as the nature of the case may require.

Stats. 1850, 254, Sec. 12.



**SEC. 148.** When the decree of divorce is rendered on the ground of adultery or extreme cruelty, the party found guilty thereof is only entitled to such portion of the common property as the Court granting the decree may, in its discretion, from the facts of the case, deem just.

How disposed of when divorce rendered on adultery as a cause.

Stats. 1850, 254, Sec. 12.

**SEC. 149.** The order for the disposition of the common property under the preceding section is subject to revision on appeal, in all respects, including the exercise of discretion by the Court below.

Such an action subject to revision on appeal.

Stats. 1850, 254, Sec. 12.

## CHAPTER III.

### HUSBAND AND WIFE.

- Section 155.** Mutual obligations of husband and wife.
156. Rights of husband, as head of family.
157. In other respects, their interests separate.
158. Husband and wife may make contracts.
159. How far may impair their legal obligations.
160. Consideration for agreement of separation.
161. May be joint tenants, etc.
162. Separate property of the wife.
163. Separate property of the husband.
164. Common property.
171. Inventory of separate property of wife.
172. Filing inventory, notice of wife's title.
173. Non-entry of property therein prima facie evidence that it is not common property.
174. Earnings of wife not liable for debts of husband.
175. Earnings of wife, when living separate, separate property.
176. Liability for debts of wife contracted before marriage.
177. Wife's property not liable for debts of the husband, but liable for her own debts.
178. Power of the husband over common property.
179. Courtesy and dower not allowed.
180. Neither answerable for the acts of the other.
181. Support of wife.
182. Husband not liable when abandoned by wife.
183. Rights of husband and wife governed by what.
184. Marriage settlement contracts, how executed.
185. To be acknowledged and recorded.
186. Effect of recording.
187. Minors may make marriage settlements.
188. Rights of married woman as sole trader.

**Mutual obligations of husband and wife.** SEC. 155. Husband and wife contract towards each other obligations of mutual respect, fidelity and support.

N. Y. C. C., Sec. 75.

**Rights of husband, as head of family.** SEC. 156. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

N. Y. C. C., Sec. 76.

**In other respects, their interests separate.** SEC. 157. Except as mentioned in Sec. 158, neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling.

N. Y. C. C., Sec. 78.

**Husband and wife may make contracts.** SEC. 158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the Title on *Trusts*.

N. Y. C. C., Sec. 79.

**How far may impair their legal obligations.** SEC. 159. A husband and wife cannot, by any contract with each other, alter their legal relations, except as to property, as provided in Sec. 158, and except that they may agree to an immediate separation, and may make provision for the support of either of them and of their children during such separation.

"Marriage," Secs. 14, 15, 22, 23; N. Y. C. C., Sec. 80; *Beach vs. Beach*, 2 Hill, 260; 1 Shar. Bl., 441 and note.

**Consideration for agreement of separation.** SEC. 160. The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section.

N. Y. C. C., Sec. 81.

**May be joint tenants, etc.** SEC. 161. A husband and wife may hold real or personal property together, jointly or in common, or as community property.

N. Y. C. C., Sec. 82.

**Separate property of the wife.** SEC. 162. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, be-

quest, devise or descent, with the rents, issues and profits thereof, is her separate property. •

Const., Art. XI, Sec. 14; "Husband and Wife," Sec. 1; Snyder vs. Webb, 3 Cal., 83; Bessie vs. Earle, 4 Cal., 200; Tryon vs. Sutton, 14 Cal., 490; Dow vs. G. & C. S. M. Co., 31 Cal., 629; George vs. Ransom, 13 Cal., 322; Racouillat vs. Sansevain, 32 Cal., 376; Hart vs. Robertson, 21 Cal., 346; Ramsdell vs. Fuller, 28 Cal., 37; Lewis & Chand vs. Johns, 24 Cal., 98; 26 Cal., 546; 31 Cal., 420; 11 Cal., 71; 30 Cal., 511; 25 Cal., 367; 20 Cal., 175; 12 Cal., 564; 14 Cal., 576; 21 Cal., 47; 31 Cal., 440; 15 Cal., 483.

Sec. 163. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof, is his separate property.

Separate  
property of  
the husband.

"Husband and Wife," Sec. 1; 12 Cal., 216; 26 Cal., 546; 31 Cal., 420.

Sec. 164. All other property acquired after marriage, by either husband or wife, is community property.

Common  
property.

"Husband and Wife," Sec. 2; 8 Cal., 507; 11 Cal., 201; 12 Cal., 216; 12 Cal., 247; 12 Cal., 114; 15 Cal., 127; 21 Cal., 87; 22 Cal., 283; 23 Cal., 70; 23 Cal., 393; 26 Cal., 546; 31 Cal., 440.

Sec. 171. A full and complete inventory of the separate personal property of the wife must be made out and signed by her, acknowledged or proved in the manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the Recorder of the county in which the parties reside.

Inventory  
of separate  
property of  
wife.

"Husband and Wife," Secs. 3, 4; 22 Cal., 283.

Sec. 172. The filing of the inventory in the Recorder's office is notice of the title of the wife.

Filing inven-  
tory, notice  
of wife's  
title.

"Husband and Wife," Sec. 5.

Sec. 173. The failure to file such inventory, or the non-entry of her personal property therein, is prima facie evidence, as between the wife and purchasers from the husband in good faith and for a valuable consideration, that such property is not the separate property of the wife.

Non-entry  
of property  
therein  
prima facie  
evidence  
that it is not  
common  
property.

[New section.]

Earnings of wife not liable for debts of husband.

SEC. 174. The earnings of the wife are not liable for the debts of the husband.

Stats. 1870, 226.

Earnings of wife, when living separate, separate property.

SEC. 175. The earnings and accumulations of the wife, and of her minor children living with her, or in her custody, while she is living separate from her husband, are the separate property of the wife.

Stats. 1870, 226.

Liability for debts of wife contracted before marriage.

SEC. 176. The separate property of the husband is not liable for the debts of the wife, contracted before the marriage.

"Husband and Wife," Sec. 5, 13; Van Maren vs. Johnson, 13 Cal., 308; 16 Cal., 69.

Wife's property not liable for debts of the husband, but liable for her own debts.

SEC. 177. The separate property of the wife is not liable for the debts of her husband, but is liable for her own debts, contracted before or after marriage.

[New section.] Based on "Husband and Wife," Secs. 5, 13.

Power of the husband over common property.

SEC. 178. The husband has the entire management and control of the common property, with the like absolute power of disposition, as of his own separate estate.

"Husband and Wife," Sec. 9; 5 Cal., 252; 12 Cal., 216; 15 Cal., 308.

NOTE.—The following section had a place in first draft. It is retained in the form of a note. The Legislature can restore if desirable :

"SEC. —. In cases of fraudulent transfers, gross mismanagement or profligate waste of common property by the husband, the wife may have her action in the proper Court, and is, upon proper showing, entitled to a judgment—

1. Securing to her the entire management and absolute power of disposition of it, in like manner and extent as the husband had before the commencement of the action; or,
2. Appointing a Trustee to manage it, as the Court may direct; or,
3. Equitably dividing the property, making the part awarded to each their separate property."

This is a new section, and may seem at first like an alarming innovation. There is a strange inconsistency in the existing law :

1. The property is made common between the husband and wife. They have a common interest in it.
2. The husband can sell it, give it away or wilfully destroy it—exercise all the powers of absolute, exclusive ownership, and the wife has no remedy except by *divorce* or his death. She must witness the passing away, through profligacy, of a family competence in which she has half interest—a right without a remedy. This section is intended to secure the remedy in grievous cases only.

Sec. 179. No estate is allowed the husband as tenant by courtesy, upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

Courtesy and dower not allowed.

"Husband and Wife," Sec. 10.

Sec. 180. Neither husband nor wife, as such, is answerable for the acts of the other.

Neither answerable for the acts of the other.

N. Y. C. C., Sec. 83.

Sec. 181. If the husband neglects to make adequate provision for the support of his wife, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband.

Support of wife.

N. Y. C. C., Sec. 84.

Sec. 182. A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him.

Husband not liable when abandoned by wife.

N. Y. C. C., Sec. 85.

Sec. 183. The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement, containing stipulations contrary thereto.

Rights of husband and wife governed by what.

"Husband and Wife," Sec. 14.

Sec. 184. All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.

Marriage settlement contracts, how executed.

"Husband and Wife," Sec. 16.

Sec. 185. When such contract is acknowledged or proved, it must be recorded in the office of the Recorder of every county in which any real estate may be situated which is granted or affected by such contract.

To be acknowledged and recorded.

"Husband and Wife," Sec. 17.

Sec. 186. The recording or non-recording of such contract has a like effect as the recording or non-recording of instruments affecting real property, as provided in the chapter on *Recording Transfers*.

Effect of recording.

[New section.] Based on "Husband and Wife," Sec. 18.

Minors may  
make mar-  
riage settle-  
ments.

SEC. 187. A minor capable of contracting marriage may make a valid marriage settlement.

"Husband and Wife," Sec. 20.

Rights of  
married  
woman as  
sole trader.

SEC. 188. When the wife is a sole trader, under the provisions of the CODE OF CIVIL PROCEDURE, she has the legal capacity and rights of an unmarried woman, concerning her business and property, subject to the limitations contained in that Code.

[New section.]

## TITLE II.

### PARENT AND CHILD

#### CHAPTER I. BY BIRTH.

#### II. BY ADOPTION.

### CHAPTER I.

#### CHILDREN BY BIRTH.

SECTION 193. Legitimacy of children born in wedlock.

194. Legitimacy of children born out of wedlock.

195. Who may dispute the legitimacy of a child.

196. Obligation of parents for the support and education of their children.

197. Custody of legitimate child.

198. Husband and wife living separate, neither to have superior right to custody of children.

199. When husband or wife may bring action for the exclusive control of children. Decree in such cases.

200. Custody of an illegitimate child.

201. Allowance to parent.

202. Parent cannot control the property of child.

203. Remedy for parental abuse.

204. When parental authority ceases.

205. Remedy when a parent dies without providing for the support of his child.

206. Reciprocal duties of parents and children in maintaining each other.

207. When a parent is liable for necessities supplied to a child.

208. When a parent is not liable for support furnished his child.

209. Husband not bound for the support of his wife's children by a former marriage.

**SECTION 210.** Compensation and support of adult child.

211. Parent may relinquish services and custody of child.

212. Wages of minors.

213. Right of parent to determine the residence of child.

214. Parent not liable for acts of child.

215. Wife in certain cases may obtain custody of minor children.

**SEC. 193.** All children born in wedlock are presumed to be legitimate.

Legitimacy of children born in wedlock.

N. Y. C. C., Sec. 86.

**SEC. 194.** All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate. But if during such period she marries again, and afterwards has a child, it is presumed to be her legitimate offspring by the second husband.

Legitimacy of children born out of wedlock.

N. Y. C. C., Sec. 87.

**SEC. 195.** The presumption of legitimacy can be disputed only by the husband or wife, or the heir or devisee of one or both of them, or the successors of the decedent. Illegitimacy, in such case, may be proved like any other fact.

Who may dispute the legitimacy of a child.

N. Y. C. C., Sec. 88.

**SEC. 196.** The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability.

Obligation of parents for the support and education of their children.

N. Y. C. C., Sec. 89.

**SEC. 197.** The father of a legitimate unmarried minor is entitled to its custody, services and earnings; but he cannot transfer such custody or services to any other person, except the mother, without her written consent, if she is living and capable of consent. If the father is dead, or is unable, or refuses to take the same, or has abandoned his family, the mother is entitled thereto.

Custody of legitimate child.

N. Y. C. C., Sec. 90.

**SEC. 198.** The husband and father, as such, shall have no rights superior to those of the wife and mother, in regard to the care, custody, education and control of the children of the marriage, while such husband and wife live separate and apart from each other.

Husband and wife living separate, neither to have superior right to custody of children.

When husband or wife may bring action for the exclusive control of children. Decree in such cases.

SEC. 199. Without application for a divorce, the husband or the wife may bring an action for the exclusive control of the children of the marriage; and the Court may, during the pending of such action, or at the final hearing thereof, or afterwards, make such order or decree in regard to the support, care, custody, education and control of the children of the marriage, as may be just and in accordance with the natural rights of the parents and the best interests of the children, and may at any time thereafter amend, vary or modify such order or decree, as the natural rights and the interests of the parties, including the children, may require.

Custody of an illegitimate child.

SEC. 200. The mother of an illegitimate unmarried minor is entitled to its custody, services and earnings.

N. Y. C. C., Sec. 91.

Allowance to parent.

SEC. 201. The proper Court may direct an allowance to be made to the parent of a child, out of its property, for its past or future support and education, on such conditions as may be proper, whenever such direction is for its benefit.

N. Y. C. C., Sec. 92.

Parent cannot control the property of child.

SEC. 202. The parent, as such, has no control over the property of the child.

N. Y. C. C., Sec. 93.

Remedy for parental abuse.

SEC. 203. The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, or by its relative within the third degree, or by the Supervisors of the county where the child resides; and when the abuse is established, the child may be freed from the dominion of the parent, the parent punished, and the duty of support and education enforced.

N. Y. C. C., Sec. 94.

When parental authority ceases.

SEC. 204. The authority of a parent ceases—

1. Upon the appointment by a Court of a guardian of the person of a child;
2. Upon the marriage of the child; or,
3. Upon its attaining majority.

N. Y. C. C., Sec. 95.

Remedy when a parent dies without providing for the support of his child.

SEC. 205. If a parent chargeable with the support of a child dies, leaving it chargeable to the county, and leav-



ing an estate sufficient for its support, the Supervisors of the county may claim provision for its support from the parent's estate by civil action, and for this purpose may have the same remedies as any creditors against that estate, and against the heirs, devisees and next of kin of the parent.

N. Y. C. C., Sec. 96.

Sec. 206. It is the duty of the father, the mother and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding.

Reciprocal duties of parents and children in maintaining each other.

N. Y. C. C., Sec. 97.

Sec. 207. If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessaries, and recover the reasonable value thereof from the parent.

When a parent is liable for necessities supplied to a child.

N. Y. C. C., Sec. 98.

Sec. 208. A parent is not bound to compensate the other parent, or a relative, for the voluntary support of his child, without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause.

When a parent is not liable for support furnished his child.

N. Y. C. C., Sec. 99.

Sec. 209. A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and where such is the case, they are not liable to him for their support, nor he to them for their services.

Husband not bound for the support of his wife's children by a former marriage.

N. Y. C. C., Sec. 100.

Sec. 210. Where a child, after attaining majority, continues to serve and to be supported by the parent, neither party is entitled to compensation, in the absence of an agreement therefor.

Compensation and support of adult child.

N. Y. C. C., Sec. 101.

Sec. 211. The parent, whether solvent or insolvent, may relinquish to the child the right of controlling him

Parent may relinquish services and custody of child.

and receiving his earnings. Abandonment by the parent is presumptive evidence of such relinquishment.

N. Y. C. C., Sec. 102.

Wages of  
minors.

SEC. 212. The wages of a minor employed in service may be paid to him, unless, within thirty days after the commencement of the service, the parent or guardian entitled thereto gives the employer notice that he claims such wages.

N. Y. C. C., Sec. 103.

Right of  
parent to  
determine  
the residence  
of child.

SEC. 213. A parent entitled to the custody of a child has a right to change his residence, subject to the power of the proper Court to restrain a removal which would prejudice the rights or welfare of the child.

N. Y. C. C., Sec. 104.

Parent not  
liable for  
acts of child.

SEC. 214. Neither parent nor child is answerable, as such, for the acts of the other.

N. Y. C. C., Sec. 105.

Wife in cer-  
tain cases  
may obtain  
custody of  
minor chil-  
dren.

SEC. 215. When a husband and wife live in a state of separation, without being divorced, any Court or officer of competent jurisdiction, upon application of the wife, if she is an inhabitant of this State, may grant the proper writ to inquire into the custody of any minor unmarried child of the marriage, and may award the custody of the child to either party for such time, and under such regulations, as the case may require. The decision of the tribunal is to be guided by the rules prescribed in Sec. 246.

N. Y. C. C., Sec. 106.

## CHAPTER II.

### ADOPTION.

- SECTION 221. Child may be adopted.
222. Who may adopt.
223. Consent of wife necessary.
224. Consent of child's parents.
225. Consent of child.
226. Proceedings on adoption.
227. Judge's order.
228. Effect of adoption.
229. Effect on former relations of child.
230. Adoption of illegitimate child.

**Sec. 221.** Any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter.

Child may  
be adopted.

The total absence of any provision for the adoption of children is one of the most remarkable defects of our law. Thousands of children are actually, though not legally, adopted every year; yet there is no method by which the adopting parents can secure the children to themselves, except by a fictitious apprenticeship, a form which, when applied to children in the cradle, becomes absurd and repulsive. It is, indeed, so inappropriate in every case that it is rarely resorted to. The consequence is, almost invariably, that if the real parents of the child live to see it grow to an age of usefulness and intelligence they are certain to attempt to reclaim it, sometimes through the mere selfishness of natural affection, but more commonly from base and sordid motives. The chances of an adopting parent for the retention of the child upon which, perhaps, his whole heart is centred, are therefore in the inverse ratio to the degree of his benevolence in its selection, and of his care and affection in its training. Benevolence dictates a choice from among children whose parents are least able or willing to take care of them. To relieve a child from a cruel and heartless parent is a greater mercy than to take even an orphan. Yet these are the parents who are, of all others, most likely to reclaim the child as soon as any money can be made out of it. Affection will give the child such a training as will develop its beauty and intelligence to the highest degree. Yet every grace of the child is but a premium upon the extortion of its heartless parents. This is not mere theory. Facts within the knowledge of almost every one justify these statements. There are very many childless parents who would gladly adopt children, but for their well-founded fears that they could never hold them securely.

N. Y. C. C., Sec. 107; Stats. 1870, 530, Sec. 1.

**Sec. 222.** The person adopting a child must be at least fifteen years older than the person adopted, and must have been married, and if a woman, must be a widow, or be lawfully divorced from her husband, without her fault.

Who may  
adopt.

N. Y. C. C., Sec. 108; Stats. 1870, 530, Sec. 1.

**Sec. 223.** A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife.

Consent of  
wife neces-  
sary.

N. Y. C. C., Sec. 109; Stats. 1870, 530, Sec. 2.

**Sec. 224.** A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, or of cruelty, and for either cause divorced, or adjudged to be a habitual drunkard, or who has been

Consent of  
child's par-  
ents.

judicially deprived of the custody of the child, on account of cruelty or neglect.

N. Y. C. C., Sec. 110 ; Stats. 1870, 530, Sec. 3.

Consent of  
child.

SEC. 225. The consent of a child, if over the age of twelve years, is necessary to its adoption.

N. Y. C. C., Sec. 111 ; Stats. 1870, 530, Sec. 3.

Proceedings  
on adopti. n.

SEC. 226. The person adopting a child, and the child adopted, and the other persons whose consent is necessary, must appear before the County Judge of the county where the person adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting, to the effect that the child shall be adopted, and treated in all respects as his own lawful child should be treated.

N. Y. C. C., Sec. 112 ; Stats. 1870, 530, Sec. 4.

Judge's  
order.

SEC. 227. The Judge must examine all persons appearing before him pursuant to the last section, each separately, and if satisfied that the interests of the child will be promoted by the adoption, he must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting.

N. Y. C. C., Sec. 113 ; Stats. 1870, 530, Sec. 5.

Effect of  
adoption.

SEC. 228. A child, when adopted, takes the name of the person adopting, and the two thenceforth sustain towards each other the legal relation of parent and child, and have all the right and are subject to all the duties of that relation.

N. Y. C. C., Sec. 114 ; Stats. 1870, 530, Sec. 6.

Effect on  
former rela-  
tions of child

SEC. 229. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it.

N. Y. C. C., Sec. 115 ; Stats. 1870, 530, Sec. 7.

Adoption of  
illegitimate  
child.

SEC. 230. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such ; and such child is thereupon deemed for all purposes legitimate from the time

of its birth. The foregoing provisions of this chapter do not apply to such an adoption.

This provision, like the rest, is new, but is so manifestly just, and the present state of the law is so unmerciful to innocent children, that it is presumed that no objection will be made to the change. The seducer can make reparation to the mother of his child, though she is more or less culpable, but can at present make absolutely none to the child, though perfectly innocent. By the law of France, and of almost every European nation, and in this country, by the law of Maine, Vermont, Massachusetts, Connecticut, Ohio, Illinois, Indiana, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky and Missouri, a child is legitimized by the marriage of its parents after its birth. Privacy is an indispensable element of such an adoption. To compel the father to appear before a Judge, or in any way to place the matter upon record, would brand the child with the very stigma from which a repentant father would desire to save it.

N. Y. C. C., Sec. 116; Stats. 1870, 530, Sec. 9.

NOTE.—Our Statute of 1870 was simply adopting this chapter of the New York Civil Code in advance.

## TITLE III.

### GUARDIAN AND WARD.

NOTE.—Under this head are placed not only the provisions of law relating to the guardianship of minors, but also those relating to the custody and care of persons of unsound mind. The "committee" of a lunatic is here termed a "guardian."

#### SECTION 236. Guardian, what.

237. Ward, what.

238. Kinds of guardians.

239. General guardian, what.

240. Special guardian, what.

241. Appointment by parent.

242. No person guardian of estate without appointment.

243. Appointment by Court.

244. Same.

245. Jurisdiction.

246. Rules for awarding custody of minor.

247. Powers of guardian appointed by Court.

248. Duties of guardian of the person.

249. Duties of guardian of estate.

250. Relation confidential.

251. Guardian under direction of Court.

252. Death of a joint guardian.

**SECTION 253. Removal of guardian.**

254. Guardian appointed by parent, how superseded.

255. Guardian appointed by Court, how superseded.

256. Release by ward.

257. Guardian's discharge.

258. Insane persons.

Guardian,  
what.

**SEC. 236.** A guardian is a person appointed to take care of the person or property of another.

N. Y. C. C., Sec. 117.

Ward, what.

**SEC. 237.** The person over whom or over whose property a guardian is appointed is called his ward.

N. Y. C. C., Sec. 118.

Kinds of  
guardians.

**SEC. 238.** Guardians are either—

1. General; or,

2. Special.

N. Y. C. C., Sec. 119.

General  
guardian,  
what.

**SEC. 239.** A general guardian is a guardian of the person, or of all the property of the ward within this State, or of both.

N. Y. C. C., Sec. 120.

Special  
guardian,  
what.

**SEC. 240.** Every other is a special guardian.

N. Y. C. C., Sec. 121.

Appoint-  
ment by  
parent.

**SEC. 241.** A guardian of the person of a child born, or likely to be born, may be appointed, by will or by deed, to take effect upon the death of the parent appointing—

1. If the child is legitimate, by the father, with the written consent of the mother; or by either parent, if the other is dead or incapable of consent.

2. If the child is illegitimate, by the mother.

N. Y. C. C., Sec. 122.

No person  
guardian  
of estate  
without ap-  
pointment.

**SEC. 242.** No person, whether a parent or otherwise, has any power as guardian of property, except by appointment as hereinafter provided.

N. Y. C. C., Sec. 123.

Appoint-  
ment by  
Court.

**SEC. 243.** A guardian of the person or property, or both, of a person residing in this State, who is a minor, or of unsound mind, may be appointed in all cases by the Probate Court, as provided in the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 124.

**Sec. 244.** A guardian of the property within this State of a person not residing therein, who is a minor, or of unsound mind, may be appointed by the Probate Court.

N. Y. C. C., Sec. 125.

**Sec. 245.** In all cases, the Court first making the appointment of a guardian has exclusive jurisdiction to appoint and control him, except in case of a removal pursuant to Sec. 253.

N. Y. C. C., Sec. 126.

**Sec. 246.** In awarding the custody of a minor, or in appointing a general guardian, the Court or officer is to be guided by the following considerations:

Rules for  
awarding  
custody of  
minor.

1. By what appears to be for the best interest of the child, in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the Court may consider that preference in determining the question.

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor or business, then to the father.

3. Of two persons equally eligible in other respects, preference is to be given as follows:

*First*—To a relative.

*Second*—To one who was indicated by the wishes of a deceased parent.

*Third*—To one who already stands in the position of a Trustee of a fund to be applied to the child's support.

N. Y. C. C., Sec. 127.

**Sec. 247.** A guardian appointed by a Court has power over the person and property of the ward, unless otherwise ordered.

Powers of  
guardian  
appointed  
by Court.

N. Y. C. C., Sec. 128.

**Sec. 248.** A guardian of the person is charged with the custody of the ward, and must look to his support, health and education. He may fix the residence of the

Duties of  
guardian of  
the person.

ward at any place within the State, but not elsewhere, without permission of the Court.

N. Y. C. C., Sec. 129.

Duties of  
guardian of  
estate.

SEC. 249. A guardian of the property must keep safely the property of his ward. He must not suffer any sale, waste or destruction of the real property, but must maintain the inheritance, its buildings and appurtenances, out of the moneys of the estate, and deliver the same to the ward at the close of his guardianship, in as good condition as he received them, inevitable decay and injury only excepted.

N. Y. C. C., Sec. 130.

Relation  
confidential.

SEC. 250. The relation of guardian and ward is confidential, and is subject to the provisions of the Title on *Trust*.

N. Y. C. C., Sec. 131.

Guardian  
under direc-  
tion of Court

SEC. 251. In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the Court.

N. Y. C. C., Sec. 132.

Death of a  
joint guar-  
dian.

SEC. 252. On the death of one of two or more joint guardians, the power continues to the survivor, until a further appointment is made by the Court.

N. Y. C. C., Sec. 133.

Removal of  
guardian.

SEC. 253. A guardian may be removed by the Probate Court for any of the following causes:

1. For abuse of his trust.
2. For continued failure to perform its duties.
3. For incapacity to perform its duties.
4. For gross immorality.
5. For having an interest adverse to the faithful performance of his duties.
6. For removal from the State.
7. In the case of a guardian of the property, for insolvency; or,
8. When it is no longer proper that the ward should be under guardianship.

N. Y. C. C., Sec. 134.

Guardian  
appointed by  
parent, how  
superseded.

SEC. 254. The power of a guardian appointed by a parent is superseded—



## CIVIL CODE.

1. By his removal, as provided by Sec. 253.
2. By solemnized marriage of the ward ; or,
3. By the ward's attaining majority.

N. Y. C. C., Sec. 135. Subd. 2 changed to conform to Sec. —.

Sec. 255. The power of a guardian appointed by a Court is superseded only—

Guardian appointed by Court, how superseded.

1. By the order of the Court ; or,
2. If the appointment was made solely because of the ward's minority, by his attaining majority.

N. Y. C. C., Sec. 136.

Sec. 256. After a ward has come to his majority, he may settle accounts with his guardian, and give him a release, which is valid if obtained fairly and without undue influence.

Release by ward.

N. Y. C. C., Sec. 137.

Sec. 257. A guardian appointed by a Court is not entitled to his discharge until one year after the ward's majority.

Guardian's discharge.

N. Y. C. C., Sec. 138.

Sec. 258. A person of unsound mind may be placed in an asylum for such persons, upon the order of the County Judge of the county in which he resides, as follows :

Insane persons.

1. The Judge must be satisfied, by the oath of two reputable physicians, that such person is of unsound mind, and unfit to be at large.

2. Before granting the order, the Judge must examine the person himself, or if that is impracticable, cause him to be examined by an impartial person.

3. After the order is granted, the person alleged to be of unsound mind, his or her husband or wife, or relative to the third degree, may demand an investigation before a jury, which must be conducted in all respects as under an inquisition of lunacy.

N. Y. C. C., Sec. 139.

NOTE.—This Title (Guardian and Ward) is inserted here as being concise and giving harmony to the Civil Code. Some of its provisions are also in "Proceedings of Probate Courts," Tit. XI, Code of Civil Procedure, which had already been prepared. They will be expunged from the one or the other before presentation to the Legislature.

## TITLE IV.

## MASTER AND SERVANT.

- SECTION 264. Minors may apprentice themselves.  
 265. Consent of parents, etc., requisite.  
 266. Written consent.  
 267. Executors may bind.  
 268. Supervisors may bind out.  
 269. Town officers.  
 270. Age of apprentice to be inserted in indentures.  
 271. Indentures, conditions in.  
 272. Same.  
 273. Deposit of indentures.  
 274. Alien minors.  
 275. Contract under preceding section to be acknowledged.  
 276. Causes for annulling indentures.  
 277. Proceedings to annul indentures.  
 278. Service of apprentice, how enforced.

Minors may  
 apprentice  
 themselves.

SEC. 264. Every minor, with the consent of the persons or officers hereinafter mentioned, may, of his own free will, bind himself, in writing, to serve as clerk, apprentice or servant, in any profession, trade or employment, during his minority; and such binding shall be as valid and effectual as if such minor was of full age at the time of making the engagement.

Stats. 1858, 134, Sec. 1.

Consent of  
 parents, etc.,  
 requisite.

SEC. 265. Such consent shall be given—

1. By the father of the minor. If he be dead or be not of legal capacity to give his consent, or if he shall have abandoned or neglected to provide for his family, and such fact be certified by a Justice of the Peace of the township or county, or sworn to by a credible witness, and such certificate or affidavit be indorsed on the indenture, then—

2. By the mother. If the mother be dead, or be not of legal capacity to give such consent or refusal, then—

3. By the guardian of such infant. If such infant have no parent living, or none in a legal capacity to give consent, and there be no guardian, then—

4. By the Supervisors of the county, or any two Justices of the Peace, or the Judge of the Probate Court of the county.

5. If such minor be an orphan, under the care and con-

trol of any orphan asylum in this State, then by the Board of Managers thereof.

Stats. 1858, 134, Sec. 2.

SEC. 266. Such consent shall be signified in writing by the person entitled to give the same, by certificate at the end of or indorsed upon the indentures.

Written  
consent.

Stats. 1858, 134, Sec. 3.

SEC. 267. The executors of any last will of a parent, who shall be directed in such will to bring up his or her child to some trade or calling, may bind such child to service as a clerk or apprentice, in like manner as the father might have done if living. If there is a surviving mother, her consent also is necessary.

Executors  
may bind.

Stats. 1858, 134, Sec. 4.

NOTE.—The last clause, providing for the consent of the mother, is new.

SEC. 268. The Supervisors of the county may bind out minors who are or shall become chargeable to such county, to be clerks, apprentices or servants, which binding shall be as effectual as if such minors had bound themselves with the consent of their father.

Supervisors  
may bind out

Stats. 1858, 134, Sec. 5.

SEC. 269. In every town or city, the presiding officer of the first council or legislative board thereof, if there be more than one, or any public officer or officers appointed to provide for the poor, may in like manner bind out any child who, or whose parents are, chargeable to any such town or city.

Town officers

Stats. 1858, 134, Sec. 6.

SEC. 270. The age of every infant so bound shall be inserted in the indentures, and shall be taken to be the true age; and whenever public officers are authorized to execute any indentures, or their consent is required to the validity of the same, it shall be their duty to inform themselves fully of the infant's age.

Age of ap-  
prentice to  
be inserted  
in indent-  
ures.

Stats. 1858, 134, Sec. 7.

SEC. 271. Every sum of money paid or agreed for, with, or in relation to, the binding out of any clerk, apprentice or servant, shall be inserted in the indentures.

Indentures,  
conditions in

Stats. 1858, 134, Sec. 8.

Same.

SEC. 272. The indenture shall also contain an agreement on the part of the person to whom such child shall be bound, that he will cause such child to be instructed to read and write, and to be taught the general rules of arithmetic, or, in lieu thereof, that he will send such child to school three months of each year of the period of indenture.

Stats. 1858, 134, Sec. 9.

Deposit of  
indentures.

SEC. 273. The counterpart of any indenture executed by any county, or city or town officers, shall be by them deposited in the offices, respectively, of the Clerk of any such county, city or town.

Stats. 1858, 134, Sec. 10.

Alien minors

SEC. 274. Any minor, capable of becoming a citizen of this State, coming from any other country, State or Territory, may bind himself to service until his majority, or for any shorter term. Such contract, if made for the purpose of raising money to pay his passage, or for the payment of such passage, may be for the term of one year, although such term may extend beyond the time when such person will be of full age, but it shall in no case be for a longer term.

Stats. 1858, 134, Sec. 11.

Contract,  
under pre-  
ceding sec-  
tion to be ac-  
knowledged.

SEC. 275. No contract made under the preceding section shall bind the servant, unless duly acknowledged by the person making such contract, before some public magistrate or other officer authorized to administer oaths, and such acknowledgment, certifying that the same was made freely on private examination, be indorsed upon the contract.

Stats. 1858, 134, Sec. 12.

Causes for  
annulling  
indentures.

SEC. 276. Such indentures of apprenticeship may be annulled for—

1. Fraud in the contract of indenture.
2. When such contract is not made or executed in accordance with the provisions of this Title.
3. For wilful non-fulfilment, by such master, of the provisions of such indenture.
4. Cruelty or maltreatment of such apprentice by the

**master, without just cause or provocation. In such case, the apprentice may recover for his services.**

Stats. 1858, 134, Sec. 14.

**SEC. 277. For the purpose of annulling such contract of apprenticeship and recovering for services, the apprentice shall have his action in the proper Court, and shall be governed therein by the CODE OF CIVIL PROCEDURE.**

Proceedings  
to annul  
indentures.

[New section.] Stats. 1858, 134, Sec. 15.

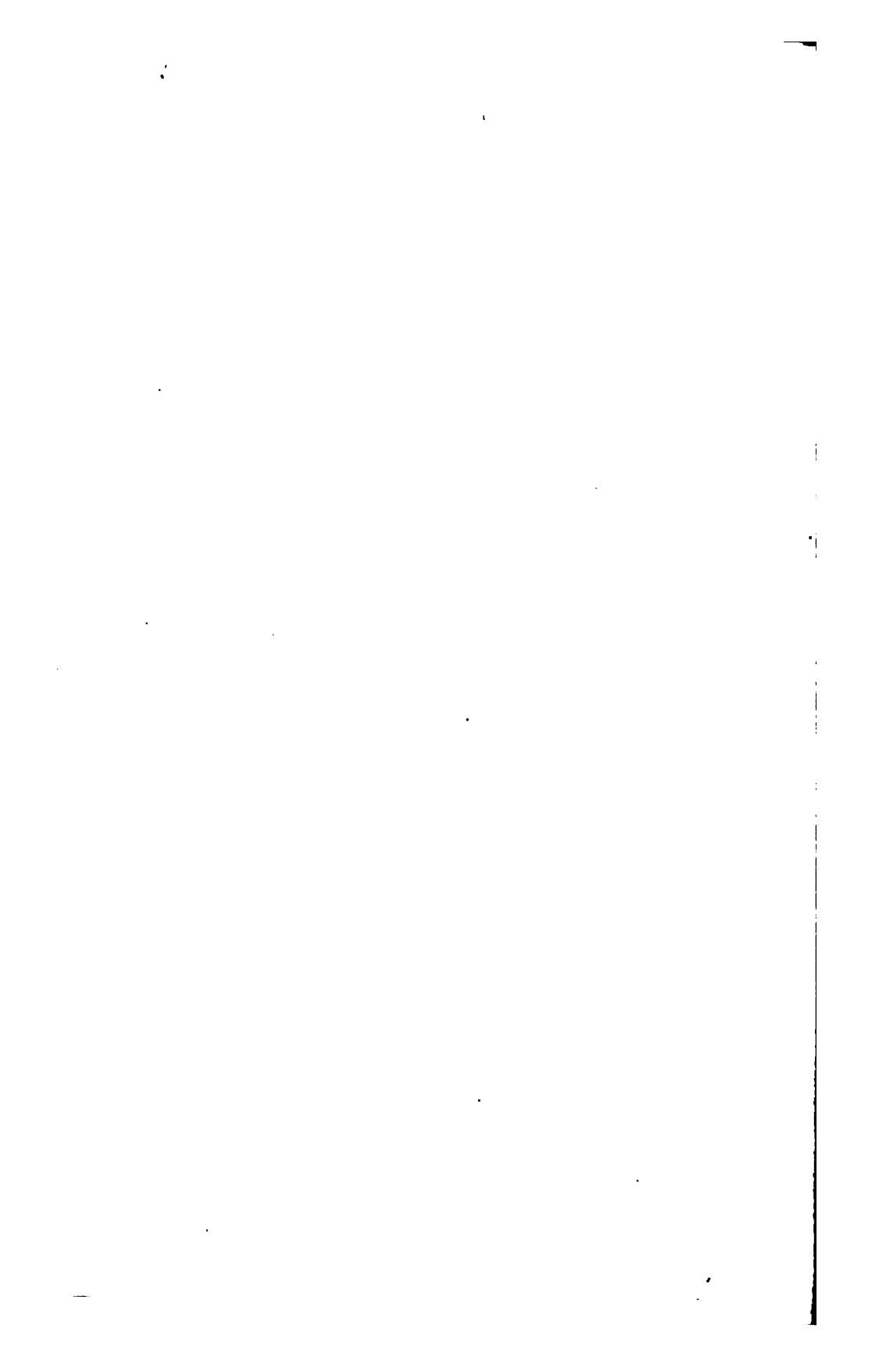
**NOTE.**—The whole section providing a system of special proceedings, is struck out and the above section substituted.

**SEC. 278. Any person held to service under the provisions of this Title, and unlawfully departing and absents himself therefrom, upon the application of the master of such person to the proper Court, shall be subject to the proceedings and orders provided in such cases in the CODE OF CIVIL PROCEDURE.**

Service of  
apprentice,  
how enforced

**NOTE.**—A section must be provided in the Code of Civil Procedure.

This Title (Master and Servant), is a literal copy of the Statutes of 1858, save the last two sections, which provided for special remedies.



# PART IV.

## CORPORATIONS.

### **TITLE I. GENERAL PROVISIONS APPLICABLE TO ALL CORPORATIONS.**

- II. INSURANCE CORPORATIONS.
- III. RAILROAD CORPORATIONS.
- IV. STREET RAILROAD CORPORATIONS.
- V. WAGON ROAD CORPORATIONS.
- VI. BRIDGE, FERRY, WHARF, CHUTE AND PIER CORPORATIONS.
- VII. TELEGRAPH CORPORATIONS.
- VIII. WATER AND CANAL CORPORATIONS.
- IX. HOMESTEAD CORPORATIONS.
- X. SAVINGS AND LOAN CORPORATIONS.
- XI. MINING CORPORATIONS.
- XII. RELIGIOUS, SOCIAL AND BENEVOLENT CORPORATIONS.
- XIII. CEMETERY CORPORATIONS.
- XIV. AGRICULTURAL FAIR CORPORATIONS.
- XV. GAS CORPORATIONS.
- XVI. LAND AND BUILDING CORPORATIONS.

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## TITLE I.

### GENERAL PROVISIONS APPLICABLE TO ALL CORPORATIONS.

#### CHAPTER I. FORMATION OF CORPORATIONS.

- II. CORPORATE STOCK.
- III. CORPORATE POWERS.
- IV. EXTENSION AND DISSOLUTION OF CORPORATIONS.

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## CHAPTER I.

### FORMATION OF CORPORATIONS.

#### ARTICLE I. CORPORATIONS DEFINED AND HOW ORGANIZED.

- II. BY-LAWS, DIRECTORS, ELECTIONS AND MEETINGS.

## ARTICLE I.

## CORPORATIONS DEFINED AND HOW ORGANIZED.

## SECTION 283. Corporation defined.

- 284. What are public and private corporations.
- 285. Corporations, how formed.
- 286. For what purpose private corporations are formed.
- 287. How corporations may continue their existence under this Code.
- 288. Must commence to perpetuate, when.
- 289. Name of instrument creating corporation.
- 290. Articles of incorporation, what to contain.
- 291. Certain corporations to state further facts in articles.
- 292. Pre-requisite to filing articles. Amounts to be subscribed to be fixed.
- 293. Pre-requisite to filing articles of corporations for profit.
- 294. Oath of officer to subscription of stock and payment of ten per cent.
- 295. Five corporators, three to be citizens of the State, to sign articles and acknowledge the same.
- 296. To submit articles of insurance corporations to Insurance Commissioner.
- 297. To file articles with County Clerk and Secretary of State, and receive certificate. Term of existence.
- 298. Certified copy of certificate to be prima facie evidence of its contents.

Corporation  
defined.

SEC. 283. A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law, it may continue for any length of time which the law prescribes.

N. Y. C. C., vol. 2, p. 117.

What are  
public and  
private cor-  
porations.

SEC. 284. Corporations are either public or private. Public corporations are formed or organized for the government of a portion of the State; private corporations are formed for the purpose of religion, benevolence, education, art, literature or profit.

Const., Art. IV., Sec. 31; A. and A. on Corporations, Secs. 12, 32; N. Y. C. C., vol. 2, p. 117.

NOTE.—As much controversy has arisen, not only in our State, but throughout many of the States of the Union, on the subject of this section, we have deemed it best to give these definitions, which, in our opinion, are but a reiteration of our very explicit Constitution, and in accordance with excellent authority.

Corpora-  
tions, how  
formed.

SEC. 285. Private corporations may be formed by the voluntary association of any five or more persons, for the



purposes and in the manner prescribed in this article. A majority of such persons shall be citizens of this State. Married women may become corporators, officers and members, of religious, benevolent, art, literary or educational corporations.

Stats. 1858, 264, Sec. 2; N. Y. C. C., vol 2, p. 118.

**NOTE.**—This section is new, and is intended as a substitute for the first section of almost every Act authorizing the formation of corporations for particular purposes, of which there are many in our statutes. Their great proximity, and their diversity in the number of corporators and other respects, is intended by the Commission to be obviated by condensing provisions and sections having similar objects into one, as is done here.

In the New York Code the minimum is three, but as the majority of our corporation Acts name a larger number as their minimum—some as many as thirteen—the Commission, for obvious reasons, felt unwilling to place the number less than five. The following Acts show the numbers adopted (late legislation has increased rather than diminished the number): Stats. 1850, 347; 1851, 523; 1861, 607; 1853, 87; 1857, 75; 1859, 281; 1862, 199; 1866, 743; 1866, 752; 1853, 169; 1858, 57; 1861, 567; 1863, 624.

**SEC. 286.** The purposes for which private corporations may be formed are the following, and none other :

For what  
purpose  
private cor-  
porations  
are formed.

1. Fire and marine, life or health and accident insurance.

2. The insurance of the lives of domestic animals.

3. Construction, conduct and maintenance of railroads, and telegraph lines in connection therewith.

4. Construction, conduct and maintenance of street railroads, plank roads, turnpikes or common wagon roads.

5. Construction, conduct and maintenance of bridges, ferries, wharves, chutes or piers.

6. The establishment, conduct and maintenance of express or stage lines.

7. Constructing, conducting and maintaining telegraph lines.

8. Constructing and maintaining canals for navigation, drainage, agricultural or mining purposes.

9. For navigating the ocean or any of the waters of this State with vessels propelled by sails, or in whole or in part by steam.

10. The purchase of lands for, and the distribution of homesteads.

For what  
purpose  
private cor-  
porations  
are formed.

11. The accumulation of funds for the purchase of real property, and for the erection of buildings and improvements thereon, for the benefit of the members thereof.

12. Accumulating savings, and loaning the funds of the members thereof.

13. Manufacturing, mining, mercantile, commercial, mechanical, wharfing and docking, or chemical purposes.

14. The transacting of a printing and publishing business.

15. To supply water to the public.

16. The manufacture and supply of gas, or the supply of light or heat to the public by any other means

17. The establishment, conduct and maintenance of hotels, laundries or theatres.

18. For the formation, conduct and maintenance of District and County Agricultural Fairs.

19. The encouragement of, or business of, agriculture, horticulture or stock raising.

20. The improvement of the breed of domestic animals.

21. The support, conduct and maintenance of colleges of learning or any literary or scientific object, or for the promotion of any of the sciences or fine arts.

22. Acquiring, preserving and conducting public libraries.

23. The organization and conduct of Chambers of Commerce, Boards of Trade and Mechanic Institutes.

24. The support, conduct and maintenance of homes and schools for orphans and foundlings, or either of them, or those otherwise destitute.

25. For the purposes of religion, sociability, benevolence or learning.

26. The purchase of lands for, and the maintenance of, cemeteries.

[New section.]      Stats. 1865-6, 743, 752; 1861, 607; 1853, 114, 160; 1862, 540; 1850, 347; 1867-8, 539; 1862, 199; 1867-8, 459; 1870, 130-2, 364; 1870, 523; 1853, 574; 1857, 121; 1862, 41; 1863-4, 76; 1870, 822; 1852, 171; 1870, 660; 1870, 815; 1859, 104; 1867-8, 204, 218; 1870, 419; 1863, 624; 1865-6, 469; 1857, 75; 1850, 347; 1870, 402, 702; 1859, 281.

NOTE.—It will be observed that in the classification of the purposes for which corporations may be organized, one very extensive class has been omitted. We allude to the seventh class, under the Act of April 14th, 1853, p. 87, which reads thus: "Or for the purpose of engaging in any

other species of trade or commerce, foreign or domestic." This was "amended," March 5th, 1864 (Stats. 1863-4, 149), by inserting the word "business" after the word "trade." We are of the opinion that this was an *advance backwards*; and subsequent legislation on the same subject—even that had at the session of 1870 (Stats. 1870, 822)—shows that a similar "advance," to a greater extent, has been made. It is not our purpose, in this note, to discuss the propriety of "specifying" particularly the objects for which corporations may be formed; but if the Act of 1853, as amended in 1863-4, and that of 1870, are to be retained, all others should be stricken from the Code, for they comprehend and permit every species of corporation. A sufficient reason for our proposed change may be found in the decision of the Supreme Court at the October Term, 1870—*Vandall vs. South San Francisco Dock Company*—in which the learned Judge (Crockett) uses this very significant language: "Whatever difficulties surround this question result from the peculiar nature of this class of corporations, organized for the *novel* purpose of speculating in real estate; and though it may be a very questionable policy which permits corporations to be formed for such a purpose, that is a consideration to be addressed to the Legislature and not to the Court." For this reason we have omitted this class of corporations, except in so far as they are embraced in the classes enumerated in this section, which are supposed to be sufficiently broad to embrace every character of business requiring a combination of capital for the successful prosecution of the proposed business.

**SEC. 287.** Any existing corporation formed under any law of this State, for any purpose designated in any subdivision of the preceding section, may, at a meeting of its members, stockholders or shareholders, called for that purpose, continue its existence, under Tit. I of this Part, or under the provisions of any subsequent Title particularly applicable thereto, as follows:

How corporations may continue their existence under this Code.

1. Public notice of such meeting must be given by publishing the same, together with its object, in a daily newspaper for two weeks, or a weekly newspaper for four weeks, successively, published in the county where the principal place of business of the corporation is located, or in lieu of the publication personal notice thereof may be given to each member, stockholder or shareholder thereof.

2. Two-thirds of the members, stockholders or shareholders, representing two-thirds of the capital stock or shares, must vote in favor of such continuance.

3. A copy of the proceedings of this meeting, giving

the names of all persons present, the votes taken, the notice calling the meeting, and the proof of publication or service thereof, all duly certified by the President and Secretary of the corporation, must be filed in the offices of the Secretary of State and Clerk of the county where the articles of incorporation are on file. Thereafter such corporation is possessed of all the rights and powers and subject to all the obligations, restrictions and limitations provided in this Part applicable thereto, and its corporate existence is continued.

[New section.]

Must commence to perpetuate, when.

SEC. 288. Unless within ninety days after this Code goes into effect proceedings are commenced to continue its existence under this Code, as provided in the preceding section, and such proceedings are completed and perfected within forty days thereafter, every existing corporation organized under any law of this State is suspended, and its charter of authority is withdrawn.

[New section.]

NOTE.—The object of the two preceding sections is to place all corporations on an equal footing, and under a general system of uniformity. The method of continuation is easy, and certainly unobjectionable.

Name of instrument creating corporation.

SEC. 289. The instrument by which a private corporation is formed is called "articles of incorporation."

[New section.]

Articles of incorporation, what to contain.

SEC. 290. Articles of incorporation must be prepared, setting forth—

1. The name of the corporation.
2. The purpose for which it is formed.
3. The place or places where its business is to be transacted or where its principal office is located.
4. The term for which it is to exist, not exceeding fifty years.
5. The number of its Directors or Trustees, and the names and residences of those who are appointed for the first year.
6. The amount of its capital stock and the number of shares into which it is divided.
7. The amount of capital stock actually subscribed and by whom.

N. Y. C. C., vol. 2, p. 121; *Harris vs. McGregor*, 29 Cal., 124; *Mok. H. M. Co. vs. Woodbury*, 14 Cal., 424; *S. V. Water Co. vs. San Francisco*, 22 Cal., 434; Stats. 1868, 539, Secs. 2, 3.

**NOTE.**—On examination, it will be observed that the main features of the articles of incorporation provided for under every Corporation Act is embodied in this section. Reference is here made to the same Acts as in the note to Sec. 286.

**SEC. 291.** The articles of incorporation of any railroad, telegraph, canal, water, wagon road, stage line or express organization must also state—

Certain corporations to state further facts in articles.

1. The kind of road, telegraph, canal, water works, stage line or express intended to be constructed.
2. The place from and to which it is intended to be run, and all the intermediate branches.
3. The estimated length of the road, telegraph, canal, water works, stage line or express.
4. That at least ten per cent. of the capital stock subscribed has been paid in to the Treasurer of the intended corporation.

N. Y. C. C., vol. 2, p. 121.

**SEC. 292.** Each intended corporation named in the preceding section, before filing articles of incorporation, must have actually subscribed to its capital stock, for each mile of the contemplated work, the following amounts, to wit :

Pre-requisite to filing articles.

1. One thousand dollars per mile of railroads.
2. One hundred dollars per mile of telegraph lines.
3. Three hundred dollars per mile of canals, water works or wagon roads.

Amounts to be subscribed to be fixed.

Stats. 1853, 114, 169; 1861, 607.

**NOTE.**—It is intended by the Commission, as far as practicable, to make this pre-requisite uniform on all corporations for profit, as will be observed from this and the following section. At present, some have the provision, others do not.

**SEC. 293.** Before articles of incorporation of any corporation for profit, except those mentioned in the preceding section and those specially excepted in this Part, are filed, there must be, by bona fide subscribers, at least one-fifth portion of the whole proposed capital stock actually

Pre-requisite to filing articles of corporations for profit.

subscribed, and ten per cent. thereof paid into the treasury of the corporation.

Stats. 1850, 270, Secs. 156, 157.

NOTE.—Of course this means ten per cent. of the one-fifth.

Oath of officer to subscription of stock and payment of 10 per cent.

SEC. 294. Before the Secretary of State issues to any corporation organized for profit, a certificate of the filing of articles of incorporation, there must be filed in his office an affidavit of the President, Secretary or Treasurer named in the articles, that the required amount of the capital stock thereof, if the corporation has a capital stock, has been actually subscribed and ten per cent. thereof actually paid into the treasury of such proposed corporation.

Dannebroke Mining Company vs. Allment, 26 Cal., 286 ;  
Mokelumne Hill Mining Company vs. Woodbury, 14 Cal., 424.

NOTE.—This provision, existing in many of our laws, is made applicable to all not purely religious or benevolent, or to promote education, art or literature.

Five corporations, three to be citizens of the State, to sign articles and acknowledge the same.

SEC. 295. The articles of incorporation must be subscribed by five or more persons, three of whom must be citizens of this State, and acknowledged by each before some officer authorized to take and certify acknowledgments of deeds.

N. Y. C. C., vol. 2, p. 121.

NOTE.—This provision is in all our corporation laws. See also, note to Sec. 286.

To submit articles of insurance corporations to Insurance Commissioner.

SEC. 296. Articles of insurance corporations, before they are filed, must be submitted to the Insurance Commissioner, who must indorse his approval thereon; but he may, as a condition thereof, require the name of the corporation to be changed, if it is, in his judgment, likely to mislead the public.

Stats. 1867-8, 339, Sec. 11.

To file articles with County Clerk and Secretary of State, and receive certificate.

SEC. 297. Upon the filing of the articles of incorporation in the office of the County Clerk of the county in which the business of the company is conducted, or the principal office or object of the corporation is located; or if its business or works extend over two or more counties, then either in the county where its principal office is

located, or in the county first named in alphabetical order; and a copy thereof with the Secretary of State, the Secretary of State must issue to the corporation, over the seal of the State, a certificate that such articles, containing the required statement of facts, have been filed in his office; and thereafter the persons signing the same, and their associates and assigns, are a body politic and corporate, by the name stated in the certificate, and for the term of fifty years, unless it is in the articles of incorporation otherwise stated, or in this Part otherwise specially provided.

Term of  
existence.

[New section.]

**SEC. 298.** A copy of any articles of incorporation, filed in pursuance of this chapter, and certified by the County Clerk of the county in which it is filed, or his deputy, or by the Secretary of State, must be received in all the Courts and other places as prima facie evidence of the facts therein stated.

Certified  
copy of cer-  
tificate to be  
prima facie  
evidence of  
its contents.

Stats. 1862, 199, Sec. 3; 1853, 83, Sec. 3; 1850, 870, Sec. 158; 1861, 566, Sec. 17.

## ARTICLE II.

### BY-LAWS, DIRECTORS, ELECTIONS AND MEETINGS.

**SECTION 302.** Adoption of by-laws—when, how, and by whom.

**303.** At first meeting of corporation by-laws to be adopted and Directors elected.

**304.** By-laws to be recorded and how amended.

**305.** By-laws may be made for certain purposes.

**306.** How many and who to be Directors. Vacancies in office of Directors and how filled.

**307.** Election of Directors—how, when, and by whom.

**308.** Organization of Board.

**309.** Officers may be removed, how.

**310.** Justice of the Peace may order meeting.

**311.** Majority of stock must be represented and a majority vote together, otherwise it is fraudulent.

**312.** All stock may be represented in votes.

**313.** Election may be postponed.

**314.** Complaints and quo warrantos, and proceedings thereon regarding elections.

**315.** Dividends to be from surplus profits.

**316.** False certificate, report or notice, to make officers liable.

**317.** Meeting by consent to be valid.

**318.** Proceedings at meeting to be binding.

Adoption of  
by-laws—  
when, how,  
and by whom

SEC. 302. All corporations formed under this Title must provide a code of by-laws for their government, not inconsistent with the Constitution and laws of this State, to be adopted at a meeting of the stockholders or members, within one month after the filing of the articles of incorporation. Notice of such meeting, by order of the acting President, specifying its object, must be published two weeks in some newspaper published in the county where the meeting is to be held, if any is published therein; if none, then in the paper having the largest circulation therein. In the adoption of the by-laws, each stockholder has as many votes as he holds shares of stock; if there is no capital stock, each member has one vote. A majority of all the subscribed capital stock, or of the members, if there is no capital stock, is necessary to adopt the by-laws, or any one of them.

Stats. 1850, 348, Sec. 7; 1862, 540, Sec. 3; 1861, 83, Sec. 4.

At first  
meeting of  
corporation  
by-laws to  
be adopted  
and Direc-  
tors elected.

SEC. 303. At the first meeting called, as soon as the by-laws are adopted, unless it is provided that the officers named in the articles of incorporation shall continue until a certain other date, Directors must be elected, a majority of the subscribed capital stock, or of the members, being necessary to a choice.

[New section.]

By-laws to  
be recorded  
and how  
amended.

SEC. 304. All by-laws adopted must be certified by the officers of the corporation, and filed and recorded in the Recorder's office of the county where the principal office of the corporation is located. The by-laws thus adopted must not be altered or amended except at a special meeting of the stockholders or members, to be called by the Directors for that purpose, specifying in the order the proposed amendments, and a two third vote of all the subscribed capital stock, or of the members, is necessary to adopt the same.

[New section.]

By laws may  
be made for  
certain pur-  
poses.

SEC. 305. All corporations may, by their by-laws, where no other provision is specially made, determine—

1. The time, place and manner of calling and conducting their meetings.



2. The number of stockholders or members, or quantity of stock, that shall constitute a quorum.
3. The number of shares that shall entitle the stockholders respectively to one or more votes.
4. The mode of voting by proxy.
5. The mode of selling shares for the non-payment of assessments or instalments.
6. The compensation and duties of officers.
7. The tenure of office of subordinate officers; and,
8. They may prescribe suitable penalties for violations of their by-laws, not exceeding, in any case, one hundred dollars for any one offence.

Stats. 1850, 347, Sec. 7.

SEC. 306. The corporate powers, business and property of all corporations formed under this Title must be exercised, conducted and controlled by a Board of not less than five nor more than eleven Directors, to be elected from among the holders of stock in, or where there is no capital stock, then from the members of, such corporation, a majority of whom must be citizens of this State. Directors of corporations for profit must be holders of stock therein in an amount to be fixed by the by-laws of the corporation. Directors of all other corporations must be members thereof. Unless a quorum is present and acting, no business performed or act done is valid as against the corporation. Whenever a vacancy occurs in the office of Director, unless the by-laws of the corporation otherwise provide, such vacancy must be filled by an appointee of the Board.

How many  
and who to  
be Directors.

Vacancies  
in office of  
Directors  
and how  
filled.

Stats. 1853, 169, Secs. 5, 7, 8; 1865-6, 743; 1865-6, 752;  
1850, 347, Secs. 159, 345, 347; 1850, 178, Sec. 6;  
1862, 199, Sec. 6; 1863, 624, Sec. 1.

SEC. 307. All corporations must provide in their by-laws for the election of Directors annually, and for notice of the election to be given to the stockholders or members thereof by publication, personal notice or otherwise. Corporations for profit must also publish notice of such election in some newspaper published in the county where the principal office of the corporation is located; if none, then in that paper having the largest circulation therein. A majority of the subscribed capital stock, or

Election of  
Directors—  
how, when,  
and by whom

of the members, is necessary to a choice. All elections must be by ballot.

Stats. 1853, 159; 1861, 607; 1850, 347, 281; 1870, 577, Sec. 1.

Organization  
of Board.

SEC. 308. Immediately after their election, the Directors must organize by the election of a President, Secretary and Treasurer, from among their number, a majority of whom must be citizens of this State; they must give the bonds, and perform the duties enjoined on them by law, the articles of incorporation and the by-laws of the corporation. No order of the Directors is valid unless made by a majority and entered on the minutes of the Board, with the date thereof, and giving the names of the Directors present, and signed by the President and Secretary. All contracts or other valid orders or writings, made by the Directors or its officers, when directed by the by-laws or ordered by the Directors, must be over the corporate seal.

Stats. 1850, 347, Sec. 159; 1850, 373, Sec. 175; 1850, 375, Sec. 189; 1853, 169, Sec. 4; 1861, 609, Sec. 4; 1865-6, 743, Sec. 4; 1865-6, 754, Sec. 6.

Officers may  
be removed,  
how.

SEC. 309. At all general meetings of the stockholders or members, two-thirds in value of the subscribed stock or two-thirds of the members thereof being present in person or by proxy and voting therefor, any President, Director, or other officer of such corporation may be removed and others elected in their stead; previous notice of such intended removal must first be given as herein required for elections.

Stats. 1861, 610, Sec. 7.

Justice of  
the Peace  
may order  
meeting.

SEC. 310. Whenever, from any cause, there is no person authorized to call or to preside at a meeting of a corporation, any Justice of the Peace of the county where such corporation is established, may, on written application of three or more of the stockholders or of the members thereof, issue a warrant to one of the stockholders or members, directing him to call a meeting of the corporation, by giving the notice required, and the Justice may in the same warrant direct such person to preside at such meeting until a clerk is chosen and qualified, if there is no other officer present legally authorized to preside thereat.

Stats. 1850, 347.

**Sec. 311.** At all elections or votes had for any purpose there must be a majority of the subscribed capital stock, or of the members, represented either in person or by proxy in writing. Every person acting therein in person, or by proxy or representative, must be a member thereof or a bona fide stockholder, having stock in his own name on the stock books of the corporation at least ten days prior to the election. Any vote or election had, other than in accordance with the provisions of this article, is prima facie fraudulent and void against absent stockholders or members, and may be set aside by petition to the District Court of the county where the same was held. Any regular or called meeting of the stockholders or members may adjourn from day to day or from time to time, if for any reason there is not present a majority of the subscribed stock or members, or no election or majority vote had, such adjournment and the reasons thereof being recorded in the journal of proceedings of the Board of Directors.

Majority of stock must be represented and a majority vote together, otherwise it is fraudulent

Stats. 1861, 607, Secs. 5, 6; 1853, 169, Sec. 8.

**Sec. 312.** The shares of stock of an estate of a minor, insane or deceased person may be represented at all elections and meetings of the corporation, by the legal representative of the person holding the same, and any stockholder who has hypothecated his stock, except by transfer on the books of the corporation, may nevertheless represent such stock at all elections and meetings.

All stock may be represented in votes.

Stats. 1861, 610, Sec. 8; 1861, 567, Secs. 12, 13; 1853, 169, Sec. 8; 1863, 89, Secs. 11, 12; 1862, 199, Sec. 23.

**Sec. 313.** If, from any cause, an election does not take place on the day appointed in the by-laws or articles of incorporation, it may be held on any day thereafter, as is provided for in such by-laws or articles of incorporation, or to which such election may be adjourned or ordered by the Directors.

Election may be postponed.

Stats. 1850, 347, Sec. 168; 1853, 88, Sec. 6; 1862, 199, Sec. 7; 1861, 610, Sec. 8; 1863, 624, Sec. 10.

**Sec. 314.** Upon the application of any person or body corporate, aggrieved by any election held by any corporate body, or any proceedings thereof, the District Judge

Complaints and quo warrant as, and proceedings thereon regarding elections.

of the district in which such election is held must **pro-**ceed forthwith summarily to hear the affidavits, **proofs** and allegations of the parties, or otherwise inquire **into** the matters of complaint, and thereupon confirm **the** election, order a new one, or direct such other relief **in** the premises as accords with right and justice, and **may** direct the District Attorney to file information **in the** nature of quo warranto in the premises. Before any **pro-**ceedings are had under this section, five days notice thereof must be given to the adverse party or those **to** be affected thereby.

Stats. 1850, 347, Sec. 15.

Dividends  
to be from  
surplus  
profits.

SEC. 315. The Directors of corporations must **not** make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase the capital stock, except as hereinafter specially provided. For a violation of the provisions of this section, the Directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the Directors at the time, or were not present when the same did happen), are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such Directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution or the expiration of its term of existence.

Stats. 1850, 348; 1861, 607, Sec. 50; 1865-6, 747, Sec. 12; 1865-6, 757, Sec. 13; 1861, 626, Sec. 56; 1853, 89, Secs. 13, 14.

False certifi-  
cate, report  
or notice, to  
make officers  
liable.

SEC. 316. Any officer of a corporation who makes or gives a certificate, official report, public notice, or entry in any of the records or books of the corporation, concerning their corporation or its business, which is false in

any material representation, and who knew or had full opportunity to know the same to be false, is liable for all the debts of the corporation contracted while he was a stockholder or officer thereof, and if more than one violates the provisions of this section in concert, they are jointly and severally liable.

Stats. 1861, 626, Sec. 55; 1865-6, 747, Sec. 16; 1853, 90, Sec. 19.

SEC. 317. When all the stockholders or members of a corporation are present at any meeting, however called or notified, and sign a written consent thereto on the record of such meeting, the doings of such meeting are as valid as if had at a meeting legally called and noticed.

Meeting by consent to be valid.

Stats. 1850, 347, Sec. 10.

SEC. 318. The stockholders or members of such corporation, when so assembled, may elect officers to fill all vacancies then existing, and may act upon such other business as might lawfully be transacted at regular meetings of the corporation.

Proceedings at meeting to be binding

Stats. 1850, 347, Sec. 11.

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## CHAPTER II.

### CORPORATE STOCK.

#### ARTICLE I. STOCK AND STOCKHOLDERS.

##### II. ASSESSMENT OF STOCK.

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#### ARTICLE I.

##### STOCK AND STOCKHOLDERS.

Section 321. All corporations may call in subscriptions and enforce collections.

322. Liabilities of stockholders. They may be released, when.

323. Certificates, how and when issued.

324. Transfer of shares.

325. Transfer of shares held by married women, etc. Dividends payable to married women.

326. Non-resident stockholders. Bonds.

327. Debts not to exceed capital stock.

All corporations may call in subscriptions and enforce collections.

**Sec. 321.** Every corporation for profit, unless it is in this Part otherwise specially provided, may, by order of its Directors, demand and call in from the stockholders, at such times and in such amounts or instalments as the Directors may require, the sums by them subscribed, and may enforce the payment thereof either by suit or as provided hereinafter for levying and collecting assessments upon stock.

Stats. 1863-4, 492, Sec. 1; 1853, 88, Sec. 10; 1853, 169, Sec. 14; 1850, 372, Sec. 176; 1850, 375, Sec. 190; 1850, 376, Sec. 194.

Liabilities of stockholders

**Sec. 322.** Each stockholder or member of any corporation is severally, individually and personally liable for such proportion of all its debts and liabilities as the amount of stock or shares owned by him in such corporation bears to the whole of the subscribed capital stock or shares of the corporation, for the recovery of which joint or several actions may be instituted and prosecuted; and in any such action against any of the stockholders or members of a corporation, the Court must ascertain and determine the proportion of the debt which is the subject of the suit for which each of the stockholders or members who are defendants in the action are severally liable, and judgment must be given severally in conformity therewith. If any stockholder or member of a corporation pays his proportion of any debt due by such corporation, he is released and discharged from any further individual or personal liability for such debt. Stock held as collateral security, or by a Trustee, or in any other representative capacity, does not make the holder thereof a stockholder, but the pledgor, or person or estate represented, is the stockholder.

They may be released, when.

Stats. 1863, 766; 1865-6, 758, Sec. 17; 1853, 87, Sec. 16, 17; Const., Art. IV, Sec. 36.

Certificates, how and when issued.

**Sec. 323.** All corporations for profit must issue certificates for stock fully paid up, signed by the President and Secretary, and may provide, in their by-laws, for issuing partially paid certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide.

Stats. 1861, 614, Sec. 14.

SEC. 324. Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate thereof; but such transfer is not valid, except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares and the date of the transfer.

Transfer of  
shares.

Stats. 1862, 111; 1861, 607, Sec. 12; 1853, 169, Sec. 13;  
1853, 85, Sec. 9; 1862, 199, Sec. 21.

SEC. 325. Shares of stock in corporations held or owned by a married woman may be transferred by her, her agent or attorney, without the signature of her husband, in the same manner as if such married woman were a feme sole. All dividends payable upon any shares of stock of a corporation held by a married woman may be paid to such married woman, her agent or attorney, in the same manner as if she were unmarried, and it is not necessary for her husband to join in a receipt therefor; and any proxy or power given by a married woman, touching any shares of stock of any corporation owned by her, is valid and binding without the signature of her husband, the same as if she were unmarried.

Transfer of  
shares held  
by married  
women, etc.

Dividends  
payable to  
married  
women.

Stats. 1861, 607, Sec. 12.

SEC. 326. In all transfers of shares of stock in corporations, on behalf of owners residing out of the State, the President, Secretary or Directors of such corporation, before entering such transfer on the books of the corporation or issuing the certificate therefor to the transferee, must require from such attorney, or from the person claiming under such transfer, a bond of indemnity, with two sureties, satisfactory to the officers of the corporation, or if not so satisfactory, then approved by the District Judge of the district in which the principal office of the corporation is situated, conditioned to protect such corporation against any liability to the legal representatives of the owner of such stock, in case of his or her death before such transfer; and in case of refusal to furnish such

Non-resident  
stockholders

Bonds.

bonds upon request, such transfer is utterly void as against the corporation.

Stats. 1862, §110, Sec. 12.

Debts not to exceed capital stock.

SEC. 327. The total amount of debts of any corporation must not at any time exceed the amount of the capital stock actually paid in ; and in case of any excess, the Directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the Directors at the time, and except those who were not present when the same did happen, are, in their individual and private capacities, jointly and severally liable for such excess, to the corporation, and in the event of its dissolution, to any of the creditors thereof, to the full amount of such excess, with legal interest from the time such liability accrued ; and no statute of limitation is a bar to any suit against such Directors for any sums of money for which they are made liable by this section.

Stats. 1850, §347, Sec. 14 ; 1861, §607, Sec. 56.

## ARTICLE II.

### ASSESSMENTS OF STOCK.

#### SECTION 331. Directors may levy assessments.

- 332. Limitation. How levied.
- 333. Majority of Board may order assessments.
- 334. What order shall contain.
- 335. Notice of assessment. Form.
- 336. Publication and service.
- 337. Delinquent notice. Form.
- 338. Contents of notice.
- 339. How published.
- 340. Jurisdiction acquired, how.
- 341. Sale to be by public auction.
- 342. Highest bidder to be the purchaser.
- 343. In default of bidders, corporation may purchase.
- 344. Disposition of stock purchased by corporation.
- 345. Extension of time of delinquent sale.
- 346. Assessments shall not be invalidated.
- 347. Action for recovery of stock, and limitation thereof.
- 348. Affidavits of publication. Affidavits of sale. To be filed.

Directors may levy assessments.

SEC. 331. The Directors of any corporation formed under the laws of this State, for the purpose of paying expenses, conducting business or paying debts, may levy



and collect assessments upon the capital stock thereof, in the manner and form and to the extent provided herein.

Stats. 1865-6, 458 ; 1861, 41, Sec. 1 ; 1863-4, 492, Sec. 1.

**SEC. 332.** No one assessment must exceed five per cent. of the amount of the capital stock named in the articles of incorporation, except as in this Part specially provided, and none must be levied while any portion of any previous assessment remains unpaid or uncollected, except in cases where all the powers of the corporation have been exercised, in accordance with the terms of this article, for the purpose of collecting such previous assessment, and except, also, the collection of a previous assessment against one or more stockholders is restrained by injunction or other process ; in which case a further assessment may be levied and collected, according to this article.

Limitation.

How levied.

Stats. 1865-6, 458, Sec. 2.

**SEC. 333.** No assessment must be levied, except by order of a majority of the Board of Directors, entered upon the records of the corporation.

Majority of Board may order assessments.

Stats. 1865-6, 458, Sec. 3.

**SEC. 334.** Every order levying an assessment must specify the amount thereof, when, to whom and where payable ; fix a day, subsequent to the full term of publication of the assessment notice, on which the unpaid assessments shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment ; and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent.

What order shall contain

Stats. 1865-6, 459, Sec. 4.

**SEC. 335.** Upon the making of the order, the Secretary shall cause to be published a notice thereof, in the following form :

Notice of assessment.

[Name of corporation in full. Location of works].  
Notice is hereby given, that at a meeting of the Directors, held on the [date], an assessment of [amount] per share was levied upon the capital stock of the corporation, payable [when, to whom and where]. Any stock upon which this assessment shall remain unpaid on the [day fixed] will be delinquent and advertised for sale at public auction, and, unless payment is made before, will be sold on the [day appointed] to pay the delinquent

Form.

assessment, together with costs of advertising and expenses of sale.

[Signature of Secretary, with location of office.]

Stats. 1868, 540, Sec. 3.

Publication  
and service.

SEC. 336. The notice must be published once each week for four successive weeks, in some daily or weekly paper published at the place designated in the articles of incorporation as the principal place of business, and also in some paper published in the county in which the works of the corporation are situated, if a paper is published therein; if the works of the corporation are not situated within some State or Territory of the United States, then publication in a paper of the county is not necessary; if there is no newspaper published at the place designated as the principal place of business of the corporation, then the publication must be made in the newspaper published nearest thereto. The notice specified in the preceding section may be served by delivering a copy thereof, certified by the Secretary, to each stockholder personally; and in case of such service upon all the stockholders of the corporation, no notice by publication is necessary, but such personal notice is sufficient.

Stats. 1865-6, 459, Sec. 6.

Delinquent  
notice.

SEC. 337. If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the Secretary must, unless otherwise ordered by the Board of Directors, cause to be published in the same papers in which the notice hereinbefore provided for shall have been published, a notice substantially in the following form:

Form.

[Name in full. Location of works]. NOTICE.—There is delinquent upon the following described stock, on account of assessment levied on the [date], [and assessments levied previous thereto, if any], the several amounts set opposite the names of the respective shareholders, as follows: [Names, number of certificate, number of shares, amount]. And in accordance with law [and an order of the Board of Directors, made on the (date), if any such order shall have been made], so many shares of each parcel of such stock as may be necessary will be sold, at the [particular place], on the [date], at [the hour] of such day, to pay delinquent assessments thereon, together with costs of advertising and expenses of the sale.

[Name of Secretary, with location of office.]

Stats. 1863-4, 492, Sec. 2; 1865-6, 460, Sec. 7.

**Sec. 338.** The last named notice must specify every certificate of stock, the number of shares it represents, and the amount due thereon, separately, except where certificates may not have been issued to parties entitled thereto, in which case the number of shares and amount due thereon, together with the fact that the certificates for such shares have not been issued, must be stated.

Contents  
of notice.

Stats. 1865-6, 460, Sec. 8.

**Sec. 339.** The notice, when published in a daily paper, must be published for ten days, excluding Sundays and holidays, previous to the day of sale. When published in a weekly paper, it must be published in each issue for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least fifteen days prior to the day of sale.

How  
published.

Stats. 1865-6, 460, Sec. 9.

**Sec. 340.** By the publication of the notice, the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale upon which any portion of the assessment or costs of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessments due and costs of sale.

Jurisdiction  
acquired,  
how.

Stats. 1865-6, 460, Sec. 10.

**Sec. 341.** On the day, at the place and at the time appointed in the notice of sale, the Secretary must, unless otherwise ordered by the Directors, sell or cause to be sold at public auction, to the highest bidder for cash, so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon, according to the terms of sale; if payment is made before the time fixed for sale, the party paying is only required to pay the actual cost of advertising, in addition to the assessment

Sale to be by  
public auc-  
tion.

Stats. 1865-6, 460, Sec. 11.

**Sec. 342.** The person offering at such sale to pay the assessment and costs for the smallest number of shares or fraction of a share is the highest bidder, and the stock purchased must be transferred to him on the stock

Highest bid-  
der to be the  
purchaser.

books of the corporation, on payment of the assessment and costs.

Stats. 1865-6, 460, Sec. 12.

In default of  
bidders,  
corporation  
may pur-  
chase.

SEC. 343. If, at the sale of stock, no bidder offers the amount of the assessments, and costs and charges due, the same may be bid in and purchased by the corporation, through the Secretary, President or any Director thereof, at the amount of the assessments, costs and charges due; and the amount of the assessments, costs and charges must be credited as paid in full on the books of the corporation, and entry of the transfer of the stock to the corporation must be made on the books thereof. While the stock remains the property of the corporation it is not assessable, nor must any dividends be declared thereon; but all assessments and dividends must be apportioned upon and against the stockholders of the corporation.

Stats. 1865-6, 460, Sec. 13.

Disposition  
of stock  
purchased  
by corpora-  
tion.

SEC. 344. All purchases of its own stock made by any corporation, in accordance with the provisions of the preceding section, vests the legal title to the same in the corporation; and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, in accordance with the by-laws of the corporation or vote of a majority of all the remaining shares. Whenever any portion of the capital stock of a corporation is held by the corporation by purchase, a majority of the remaining shares is a majority of the stock, for all purposes of election or voting on any question at a stockholder's meeting.

Stats. 1865-6, 461, Sec. 13.

Extension  
of time of  
delinquent  
sale.

SEC. 345. The dates fixed in any notice of assessment or notice of delinquent sale published according to the provisions hereof may be extended from time to time for not more than thirty days, by order of the Directors, entered on the records of the corporation; but no order extending the time for the performance of any act specified in any notice is effectual unless notice of such extension or postponement is appended to and published with the notice to which the order relates.

Stats. 1865-6, 461, Sec. 14.

Sec. 346. No assessment is invalidated by a failure to make publication of the notices hereinbefore provided for, nor by the non-performance of any act required in order to enforce the payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of the assessment, are void, and publication must be begun anew.

Assessments shall not be invalidated.

Stats. 1868, 540, Sec. 3.

Sec. 347. No action must be sustained to recover stock sold for delinquent assessments, upon the ground of irregularity in the assessment, irregularity or defect of the notice of sale, or defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, the sum for which the same was sold, together with all subsequent assessments which may have been paid thereon, and interest on such sums from the time they were paid; and no such action must be sustained unless the same is commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale was made.

Action for recovery of stock, and limitation thereof.

Stats. 1865-6, 461.

Sec. 348. The publication of notices required by this article may be proved by the affidavit of the printer, foreman or principal clerk of the paper in which the same was published; and the affidavit of the Secretary or auctioneer is prima facie evidence of the time and place of sale, of the quantity and particular description of the stock sold, and to whom and for what price, and of the fact of the purchase money being paid. The affidavits must be filed in the office of the corporation, and copies of the same, certified by the Secretary thereof as true, are prima facie evidence of the facts therein stated. Certificates, signed by the Secretary and under the seal of the corporation, are prima facie evidence of the contents thereof.

Affidavits of publication.

Affidavits of sale.

To be filed.

Stats. 1870, 229, Sec. 1.

## CHAPTER III.

## CORPORATE POWERS.

## ARTICLE I. GENERAL POWERS.

## II. LANDS AND RIGHT OF WAY.

## III. RECORDS.

## IV. EXAMINATION OF CORPORATION.

## V. JUDGMENT AGAINST AND SALE OF CORPORATE PROPERTY.

## ARTICLE I.

## GENERAL POWERS.

## SECTION 354. Powers of corporations.

355. Limitation of powers.

356. Banking expressly prohibited.

357. Liability of stockholders.

358. Majority to form Board for business.

359. Misnomer does not invalidate instrument.

360. Corporation to organize within one year.

361. Increasing and diminishing capital stock, how.

Powers of  
corporations

SEC. 354. Every corporation, as such, has power—

1. To have succession, by its corporate name, for the period limited ; and when no period is limited, perpetually.
2. To sue and be sued in any Court.
3. To make and use a common seal, and alter the same at pleasure.
4. To hold, purchase and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this Part.
5. To appoint such subordinate officers or agents as the business of the corporation may require, and to allow them suitable compensation.
6. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock.
7. To admit and remove members, and to sell their stock or shares for the payment of assessments or instalments.
8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation.

Stats. 1850, 347 ; 1861, 85, Sec. 4 ; 1862, 540, Sec. 3 ;  
 N. Y. C. C., vol. 2, p. 125 ; Smith vs. Moore et als.,  
 2 Cal., 524 ; Gashwiler vs. Willis, 33 Cal., 19.

SEC. 355. In addition to the powers enumerated in the preceding section, and to those expressly given in that Title of this Part under which it is incorporated, no corporation shall possess or exercise any corporate powers, except such as are necessary to the exercise of the powers so enumerated and given.

Limitation  
of powers.

Stats. 1850, 347, Sec. 2; Smith vs. Moore, 2 Cal., 524.

SEC. 356. No corporation shall create or issue bills, notes or other evidences of debt, upon loans or otherwise, for circulation as money.

Banking  
expressly  
prohibited.

Stats. 1850, 347, Sec. 3; 1853, 90, Sec. 15; Const., Art. IV, Sec. 35.

NOTE.—Sec. 35 of Art. IV of the Constitution provides that the Legislature shall *prohibit* "banking" by law; hence the necessity of this section. A general provision is inserted in this Code prohibiting the creation or circulation of a paper currency by any corporation. Thus is avoided the question whether the Constitution would be self-operating, were the Legislature to remain silent.

SEC. 357. Where the whole capital of a corporation is not paid in, and that paid in is insufficient to satisfy the claims of its creditors, each stockholder is bound to pay, on each share held by him, the sum necessary to complete the amount of such share, as fixed by the charter or articles of incorporation, or such proportion thereof as may be required to satisfy the debts of the corporation.

Liability of  
stockholder

Stats. 1850, 347, Sec. 4.

SEC. 358. When the corporate powers of any corporation are directed to be exercised by any particular body or number of persons, a majority of such body or persons is a sufficient number to form a Board for the transaction of business; and every decision of a majority of the persons duly assembled as a Board is valid as a corporate act.

Majority to  
form Board  
for business.

Stats. 1850, 347, Sec. 5; 1853, 88, Sec. 7; 1864-5, 31, Sec. 1; 1862, 199, Sec. 9.

SEC. 359. The misnomer of any corporation, in any written or printed instrument, does not invalidate the same, if it can be ascertained from the instrument what corporation is meant to be described.

Misnomer  
does not  
invalidate  
instrument.

Stats. 1862, 205, Sec. 26.

Corporation  
to organize  
within one  
year.

SEC. 360. If any corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation, its corporate powers cease. The due incorporation of any company, claiming in good faith to be a corporation under this Part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the State or information of the Attorney-General.

Stats. 1862, 110, Sec. 1.

Increasing  
and dimin-  
ishing capi-  
tal stock,  
how.

SEC. 361. Every corporation may increase or diminish its capital stock as in this section provided:

1. By a majority vote of the Directors there may be called a meeting of the stockholders, to be convened for the purpose of increasing or of diminishing the capital stock.

2. Personal notice of the time and place of such meeting, and the object thereof, must be served on each stockholder resident in this State; or, in lieu thereof, the notice must be published in every issue of a newspaper published in the county where the principal place of business is located, for four weeks successively.

3. The notice must also contain the amount to which it is proposed to increase or diminish the capital stock.

4. The capital stock must in no case be diminished to an amount less than the indebtedness of the corporation or the estimated cost of the works which may be the object or purpose of the corporation to construct.

5. At least four-fifths of all the capital stock must be represented at such meeting, and at least two-thirds of the entire capital stock must vote in favor of such increase or diminution before the same is effected.

6. A certificate, signed and verified by the Chairman and Secretary of the meeting, must be made, showing a strict compliance with all the requirements of this section; the amount to which the capital stock has been increased or diminished; the amount of stock (and by whom held) represented at the meeting; the vote by which the object was accomplished; the amount of capital stock actually paid in, and the amount of all debts and liabilities of the corporation, and how secured.



7. This certificate must be subscribed by a majority of the Directors, and duplicates made, one to be filed in the office of the County Clerk and one in the office of the Secretary of State, as provided for original articles of incorporation, and thereupon the capital stock is so increased or diminished.

[New section.]      Stats. 1850, 347, Secs. 153, 196; 1853, 87, Sec. 20; 1858, 169, Sec. 25; 1865-6, 747, Sec. 17; 1861, 567, Secs. 14, 15, 16; 1862, 199, Secs. 18, 19, 20; 1867-8, 325, Sec. 4; 1863, 91, Secs. 20, 21, 22.

NOTE.—Since, under this Code, no association of persons or capital can become a corporate body until a certain percentage of a fixed proportion of the capital stock named and subscribed is paid in to their Treasurer, and thus the capital stock named may be, of necessity, smaller than desirable if the corporation proves a success, facility for increasing the capital stock is by this section provided.

Experimental and prospecting corporations may thus readily comply with the Code, and at the same time deception is prevented.

## ARTICLE II.

### LANDS AND RIGHT OF WAY.

SECTION 365. Corporations may acquire real estate, and how much.

366. State lands granted for use of corporations.

367. Grant not to embrace town lots.

368. Wood, stone and earth may be taken from State lands.

369. Corporations failing to comply with provisions, to take no grant.

370. Lands to revert to State, when.

371. Selections made, how proved and certified to.

372. County, city and town property, how acquired.

373. Administrators and guardians may convey lands of estates, how.

SEC. 365. No corporation shall acquire or hold any more real estate than may be absolutely necessary for the use of the business conducted or the construction of their works, except as specially provided, and every such corporation may exercise the right of eminent domain to acquire such necessary real estate, as provided in Tit. VII, Part III, CODE OF CIVIL PROCEDURE, when needed for the uses and purposes therein mentioned.

Corporations may acquire real estate, and how much.

[New section.]

State lands  
granted for  
use of cor-  
porations.

SEC. 366. There is granted to every corporation the right of way for the location, construction and maintenance of their necessary works, and for every necessary adjunct thereto, over any swamp, overflowed or other public lands of the State not otherwise disposed of or in use, not in any case exceeding in length or width that which is necessary for the construction of such works and adjuncts, or for the protection thereof, not in any case to exceed two hundred feet in width.

Stats. 1861, 617, Sec. 20.

Grant not to  
embrace  
town lots.

SEC. 367. The grants mentioned in the preceding section do not apply to public lands of the State within the corporate limits of towns and cities, or within three miles thereof. Such lands, not exceeding two square acres in each case, may be condemned as provided in Tit. VII, Part III, CODE OF CIVIL PROCEDURE, to the use of such corporation, on payment to the State the value thereof, ascertained in such proceedings. The grants for adjuncts, not exceeding two acres of land, must not be nearer each other than five miles along the course or line of the works.

Stats. 1861, 617, Secs. 20, 21.

Wood, stone  
and earth  
may be  
taken from  
State lands.

SEC. 368. The right to take from any of the lands belonging to the State, adjacent to the works of the corporation, all materials, such as wood, stone and earth, naturally appurtenant thereto, which may be necessary and convenient for the original construction of its works and adjuncts, is granted to such corporations as shall, in all respects, comply with the provisions of this Part and Title limiting such grants and the holding of lands.

Stats. 1861, 618, Sec. 20.

Corporations  
failing to  
comply with  
provisions,  
to take no  
grant.

SEC. 369. A corporation formed under this Part, which fails or neglects to comply strictly with the provisions thereof regulating its formation, and directing and restricting the conduct of its affairs, takes nothing, either of the lands of the State or appurtenances thereto, herein granted.

Stats. 1861, 618, Sec. 20.

Lands to  
revert to  
State, when.

SEC. 370. If any corporation receiving State lands or appurtenances thereunder is dissolved, ceases to exist, is discontinued, or the route or line of its works is so changed as not to cover or cross the lands selected, or

the use of the lands selected is abandoned, such selected lands revert, and the title thereto is reinvested in the State, free from all such uses or trusts.

[New section.] Stats. 1861, 618, Sec. 20.

SEC. 371. When any selection of the right of way, or land for an adjunct to the works of a corporation, is made by any corporation, the Secretary thereof must transmit to the Surveyor-General, Controller of State, and Recorder of the county in which the selected lands are situate, a plat of the lands so selected, giving the extent thereof and uses for which the same is claimed or desired, duly verified to be correct; and, if approved, the Surveyor-General must so indorse the plat, and issue to the corporation a permit to use the same, unless, on petition properly presented to the Court, a review is had and such use prohibited.

Selections made, how proved and certified to.

[New section.] Stats. 1861, 618, Sec. 22.

SEC. 372. When the lands of any county, city or town are required to be used by any corporation, in conformity with the law regulating the transfer thereof, the proper officers of any such county, city or town may convey the same by deed (with or without compensation, as may be agreed upon), to such corporation; if not so conveyed by agreement, such lands may be condemned as private lands are provided to be condemned, under Tit. VII, Part III, CODE OF CIVIL PROCEDURE.

County, city and town property, how acquired.

[New section.] Stats. 1861, 618, Sec. 21.

SEC. 373. For the same purposes, the lands or any interest therein of infants, idiots, insane or deceased persons, may be conveyed by the guardian, executor or administrator thereof, on application therefor to the proper Probate Court, after appraisement and notice to all persons interested, as in other cases of disposal of lands under order of the Probate Court. The sale must not be for less than three-fourths of the appraised value; and after report and approval thereof by the Court, and the payment of the purchase money, a deed must be executed. If such lands or interest cannot be thus obtained, corporations may acquire the same by proceeding under Tit. VII, Part III, CODE OF CIVIL PROCEDURE.

Administrators and guardians may convey lands of estate, how.

[New section.] Stats. 1861, 619, Sec. 23.

## ARTICLE III.

## RECORDS.

SECTION 377. Records—of what, and how kept.

378. Other records to be kept by corporations for profit, and others.

Records—of  
what, and  
how kept.

SEC. 377. All corporations for profit are required to keep a record of all their business transactions; a journal of all meetings of their Directors, members or stockholders, with the time and place of holding the same, whether regular or special, and if special, its object, how authorized and the notice thereof given. The record must embrace every act done or ordered to be done; who were present and who absent; and, if requested by any Director, member or stockholder, the time shall be noted when he entered the meeting or obtained leave of absence therefrom; on a similar request, the ayes and noes must be taken on any proposition, and a record thereof made; on similar request, the protest of any Director, member or stockholder, to any action or proposed action, must be entered in full; all such records to be open to the inspection of any Director, member, stockholder or creditor of the corporation.

Stats. 1861, 607, Sec. 11; 1853, 169, Sec. 22; 1853, 90,  
Sec. 18.

Other  
records to be  
kept by cor-  
porations for  
profit, and  
others.

SEC. 378. In addition to the records required to be kept by the preceding section, corporations for profit must keep a book, to be known as the "Stock and Transfer Book," in which must be kept a record of all stock; the names of the stockholders or members alphabetically arranged; instalments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale or transfer of stock made, the date thereof, and by and to whom; and all such other records as the by-laws prescribe. Corporations for religious and benevolent purposes must provide in their by-laws for such records to be kept as may be necessary, and none other.

[New section.]

Stats. 1861, 607, Sec. 11; 1853, 169, Sec. 22.

## ARTICLE IV.

## EXAMINATION OF CORPORATIONS, ETC.

SECTION 382. Examination into affairs of corporation, how made by officers of State.

383. Examination made by the Legislature.

384. Chapter and article may be repealed.

SEC. 382. The Attorney-General or District Attorney, whenever and as often as required by the Governor, must examine into the affairs and condition of any corporation in this State, and report such examination, in writing, together with a detailed statement of facts, to the Governor, who must lay the same before the Legislature; and for that purpose the Attorney-General or District Attorney may administer all necessary oaths to the Directors and officers of any corporation, and may examine them on oath in relation to the affairs and condition thereof, and may examine the books, papers and documents belonging to such corporation or appertaining to its affairs and condition.

Examination into affairs of corporation, how made by officers of State.

Stats. 1850, 350, Sec. 29.

SEC. 383. The Legislature, or either branch thereof, may examine into the affairs and condition of any corporation in this State at all times; and, for that purpose, any committee appointed by the Legislature, or either branch thereof, may administer all necessary oaths to the Directors, officers and stockholders of such corporation, and may examine them on oath in relation to the affairs and condition thereof; and may examine the safes, books, papers and documents belonging to such corporation, or pertaining to its affairs and condition, and compel the production of all keys, books, papers and documents by summary process, to be issued on application to any Court of record or any Judge thereof, under such rules and regulations as the Court may prescribe.

Examination made by the Legislature.

Stats. 1850, 350, Sec. 29.

SEC. 384. The Legislature may at any time amend or repeal this Part, or any Title, chapter, article or section thereof, and dissolve all corporations created thereunder; but such amendment or repeal does not, nor does the dissolution of any such corporation, take away or impair any

Chapter and article may be repealed.

remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred.

Stats. 1850, 347, Sec. 30 ; Const., Art. IV, Sec. 31.

NOTE.—The Act of February 20th, 1862, p. 17, relates to confirmation of mortgages and mortgage sales occurring prior thereto. It is not deemed essential to retain this Act. So, also, with the Act of April 1st, 1864, p. 303.

## ARTICLE V.

### JUDGMENT AGAINST AND SALE OF CORPORATE PROPERTY.

SECTION 388. Franchise may be treated as property, and sold under execution.

389. Purchaser to transact business of corporation.

390. Purchaser may recover penalties, etc.

391. Corporation to retain powers after sale.

392. Redemption of franchise.

393. When proceedings under execution may be had.

Franchise may be treated as property, and sold under execution.

SEC. 388. For the satisfaction of any judgment against a corporation organized for profit, the franchise and all the rights and privileges thereof, together with all its corporate property, may be levied upon and sold under execution, in the same manner and with like effect as property of individuals is levied upon and sold under execution, as provided for such sales in the CODE OF CIVIL PROCEDURE.

[New section.] Stats. 1850, 347, Sec. 20.

Purchaser to transact business of corporation.

SEC. 389. The purchaser at the sale must receive a certificate of purchase of the franchise, and be immediately let into the possession of all property necessary for the exercise of the powers and to derive the proceeds thereof, and must thereafter conduct the business of such corporation, with all its powers and privileges, and subject to all its liabilities, until the redemption of the same as hereinafter provided.

[New section.]

Purchaser may recover penalties, etc.

SEC. 390. The purchaser or his assignee is entitled to recover any penalties imposed by law and recoverable by the corporation for an injury to the franchise or property thereof, or for any damages or other cause, occurring during the time he holds the same, and may use the name

of the corporation for the purpose of any action necessary to recover the same. A recovery for damages or any penalty thus had is a bar to any subsequent action by or on behalf of the corporation for the same.

[New section.] **NOTE.**—For this change in the law it is deemed sufficient simply to refer to *Monroe vs. Thomas* (5 Cal., 470), *Thomas vs. Armstrong* (7 Cal., 286), and *Wood vs. Truckee Turnpike Company* (24 Cal., 487).

**SEC. 391.** The corporation whose franchise is sold, as in this article provided, in all other respects retains the same powers, is bound to the discharge of the same duties, and is liable to the same penalties and forfeitures, as before such sale.

Corporation to retain powers after sale.

Stats. 1850, 347, Sec. 26.

**SEC. 392.** The corporation may, at any time within one year after such sale, redeem the franchise by paying or tendering to the purchaser thereof the sum paid therefor, with ten per cent. interest thereon, but without any allowance for the toll which he may in the meantime have received; and upon such payment or tender, the franchise and all the rights and privileges thereof reverts and belongs to the corporation, as if no such sale had been made.

Redemption of franchise.

**NOTE.**—This provision should be placed, also, under the head of "Redemptions," in the Code of Civil Procedure.

**SEC. 393.** All the proceedings respecting the levy of executions may be had in any county in which the creditor, the President, or any Director, or the Treasurer, or the Clerk of the corporation may reside, or in which the corporation has personal or real estate.

When proceedings under execution may be had.

Stats. 1850, 347, Sec. 28.

## CHAPTER IV.

### EXTENSION AND DISSOLUTION OF CORPORATIONS.

**SECTION 399.** Proceedings to disincorporate.

400. Receivers and Directors of dissolved corporations.

401. On dissolution, Directors to be Trustees for creditors.

402. Powers of such Trustees.

403. Corporations, how dissolved.

SECTION 404. Any corporation may extend its corporate existence, how.

405. How corporations may continue their existence.

406. Tit. I to apply to all corporations, with certain exceptions.

407. Definitions.

Proceedings  
to disincor-  
porate.

SEC. 399. Any corporation may dissolve and disincorporate itself by proceedings in the County Court, as provided in Tit. VI, Part III, CODE OF CIVIL PROCEDURE, it being first determined by a vote of two-thirds of the stockholders or members thereof to disincorporate and dissolve the corporation.

Stats. 1850, 347, Sec. 31 ; 1853, 91, Sec. 24 ; 1853, 169, Sec. 28 ; 1862, 199, Sec. 24.

Receivers  
and Direc-  
tors of  
dissolved  
corporations

SEC. 400. Upon the dissolution of any corporation by decree of a Court of competent jurisdiction, the Court may appoint one or more persons, with or without bond, to be Receivers or Trustees of the corporation.

Stats. 1850, 347, Secs. 16, 18 ; 1852, 199, Sec. 25.

On dissolu-  
tion, Direc-  
tors to be  
Trustees for  
creditors.

SEC. 401. Unless other persons are appointed by the Court, the Directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, are Trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation, as provided in the preceding section.

Stats. 1857, 347, Sec. 16 ; 1853, 169, Sec. 27 ; 1853, 91, Sec. 23 ; 1852, 199, Sec. 25.

NOTE.—This section, applicable to many of our corporations, is extended to all.

Powers of  
such Trust-  
tees.

SEC. 402. The Trustees or Receivers may sue for and recover all debts and property of the dissolved corporation, in the name of the Directors or Trustees thereof, and settle the affairs thereof, and are jointly and severally responsible to the creditors, stockholders and members of such corporation, to the extent of its property and effects that comes into their hands.

Stats. 1850, 347, Sec. 17.

Corpora-  
tions, how  
dissolved.

SEC. 403. Proceedings to dissolve corporations, other than by the corporations themselves, as hereinbefore provided, must be had under Chap. V, Tit. X, Part II, of the CODE OF CIVIL PROCEDURE.

Stats. 1850, 347, Sec. 19—modified.



**Sec. 404.** Every corporation heretofore formed, for any purpose enumerated in this Title for which corporations may be formed, for a period of time less than fifty years, may, at any time prior to the expiration of the term of its corporate existence, extend such term to a period not exceeding fifty years from its formation. Such extension must be made at a meeting of the stockholders or members, after such order of the Directors and notice thereof, with such amount of capital stock or number of members represented and such affirmative vote thereof as required herein for the increase or diminution of the capital stock, and filing a certificate thereof in the same offices where their articles of incorporation are filed.

Any corporation may extend its corporate existence, how.

[New section.]      Stats. 1870, 364, Secs. 1, 2.

**Sec. 405.** All corporations may continue their existence for an additional period, not exceeding fifty years, by filing a certificate, duly sworn to by the President and Secretary, as provided for the filing of the original articles of incorporation, setting forth that, at a meeting of four-fifths of the members or stock, and on a two-thirds vote thereof, it was determined to continue such corporation for such additional length of time; the meeting of the stockholders or members to be had after notice thereof, published for four weeks in some newspaper in the county where the principal office of the corporation is located, giving the time and place of meeting; or, in lieu thereof, personal notice of such time and place of meeting may be served on all stockholders or members resident in this State. The notice to specify the object of the meeting and the length of time for which it is proposed to continue the corporation.

How corporations may continue their existence.

[New section.]      Stats. 1856, 758, Sec. 15.

**Sec. 406.** All corporations are subject to the provisions of this Title, unless in that one of the Titles following, specially applicable to them, they are specially excepted, or a special provision is therein made for such corporation, differing from the general provision on the same subject.

Tit. I to apply to all corporations, with certain exceptions.

[New section.]

**Sec. 407.** The words "stockholders" and "stock," used in this Title, apply alone to corporations for profit

Definitions.

having a capital stock; the word "members" applies to corporations organized for purposes other than profit.

[New section.]

NOTE.—The Act of March 1st, 1870, on pages 107-8, which authorizes corporations to amend their articles of incorporation, has been omitted. The machinery provided for effecting this amendment is rather cumbersome; besides, the policy of permitting corporations to change the purposes for which they were originally organized, irrespective of whether the business to be embraced in the amendment is germane to that then being conducted, is of a doubtful character, to say the least. Whenever such radical changes are necessary or beneficial to the stockholders, a dissolution and re-incorporation may be had as herein provided, with but little more delay than to amend the articles of incorporation.

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## TITLE II.

### INSURANCE CORPORATIONS.

#### CHAPTER I. GENERAL PROVISIONS.

##### II. FIRE AND MARINE INSURANCE CORPORATIONS.

##### III. MUTUAL LIFE, HEALTH AND ACCIDENT INSURANCE CORPORATIONS.

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### CHAPTER I.

#### GENERAL PROVISIONS.

SECTION 413. To comply with requirements of Insurance Commissioner.

414. Subscriptions to capital stock opened, and how collected.

415. Purchase and conveyance of real estate.

416. Policies, how issued and by whom signed.

417. Dividends, of what, and when declared.

418. Directors liable for loss on insurance in certain cases.

To comply  
with re-  
quirements  
of Insurance  
Commis-  
sioner.

SEC. 413. Every insurance corporation must, before commencing to transact its business, and at all times thereafter, comply with the requirements of the chapter on *Insurance Commissioner*, in Part I of the *POLITICAL CODE*.

SEC. 414. After the Secretary of State issues the certificate of incorporation, as provided in Art. I, Chap. I,

Tit. I, of this Part, the Directors named in the articles of incorporation must proceed in the manner specified therein, or in their by-laws, or if none, then in such manner as they may by order adopt, to open books of subscription to the capital stock then unsubscribed, and to secure subscriptions to the full amount of the fixed capital; to levy assessments and instalments thereon, and to collect the same, as in Tit. I provided.

Subscriptions to capital stock opened, and how collected.

[New section.]      Stats. 1865-6, 755, Sec. 8; 743, Sec. 14.

SEC. 415. No insurance corporation must purchase, hold or convey real estate, except for the purposes, and as hereinafter set forth, to wit:

Purchase and conveyance of real estate.

1. Such as is requisite for its accommodation in the convenient transaction of its business, not exceeding in value one hundred and fifty thousand dollars.

2. Such as shall have been conveyed to it, or to any person for it, by way of mortgage or in trust, or otherwise, to secure or provide for the payment of loans previously contracted, or for moneys due.

3. Such as shall have been purchased at sales upon deeds of trust, or judgments, decrees or mortgages obtained or made for such loans or debts.

4. Such as shall have been conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

All such real estate so acquired, and which is not requisite for the accommodation of such corporation in the transaction of its business, must be sold and disposed of within five years after such corporation shall have acquired title to the same. No such real estate must be held for a longer period than five years, unless the corporation first procures a certificate from the Insurance Commissioner that the interest of the corporation will suffer materially by a forced sale of such real estate, in which event the time for the sale may be extended to such time as the Insurance Commissioner directs in the certificate.

Stats. 1865-6, 756; 1867-8, 341.

SEC. 416. All policies made by insurance corporations must be subscribed by the President or Vice President, or, in case of the death, absence or disability of those officers, by any two of the Directors, and countersigned

Policies, how issued and by whom signed.

by the Secretary of the corporation. All such policies are as binding and obligatory upon the corporation as if executed over the corporate seal.

Stats. 1865-6, 748, Sec. 20.

Dividends,  
of what, and  
when de-  
clared.

SEC. 417. The Directors of every insurance corporation, at such times as their articles of incorporation or by-laws provide, must make, declare and pay to the stockholders dividends of so much of the net profits of the corporate business and interest on their capital stock invested as to them appears advisable; but the moneys received and notes taken for premium on risks which are undetermined and outstanding at the time of making the dividend must not be treated as profits, nor divided, except as provided in Chap. II of this Title.

Stats. 1865-6, 748, Sec. 21.

Directors  
liable for loss  
on insurance  
in certain  
cases.

SEC. 418. If any insurance corporation is under liabilities for losses to an amount equal to its capital stock, and the President or Directors, after knowing the same, shall make any new or further insurance, the estates of all who make such insurance, or assent thereto, are severally and jointly liable for the amount of any loss which takes place under such insurance.

Stats. 1865-6, 743, Sec. 13.

## CHAPTER II.

### FIRE AND MARINE INSURANCE CORPORATIONS.

SECTION 423. Capital to be at least one hundred thousand dollars.

424. Payment of subscriptions. Capital to be all paid in twelve months.

425. Certificate of capital stock paid up to be filed, and when.

426. Property which may be insured.

427. Funds may be invested, how.

428. Rate of risk.

429. Amounts to be reserved before making dividends.

430. Amounts to be reserved by companies with less than two hundred thousand dollars capital.

Capital to be  
at least one  
hundred  
thousand  
dollars.

SEC. 423. No company, corporation or association shall hereafter be formed or organized under the laws of this State, for the transaction of business in any kind of

insurance, except live stock, without a subscribed capital equal at least to one hundred thousand dollars in United States gold coin, twenty-five per cent. whereof shall be paid in previous to the issue of any policy, and the balance by monthly or quarterly instalments within twelve months from the day of filing the certificate of incorporation. Nor shall any individual or person be permitted to transact business as agent of any non-resident person or corporation, whether foreign or domestic, in any kind of insurance, except live stock, except such person or corporation shall possess available cash assets, exclusive of stock notes, to the amount of at least one hundred thousand dollars in United States gold coin, over and above all liabilities except capital.

[New section.]

NOTE.—This section was suggested by the San Francisco Board of Underwriters.

**SEC. 424.** The Directors of every fire and marine corporation may levy, demand and call in from the stockholders thereof, such percentage of the capital stock subscribed by them respectively, in such assessments or instalments as they may deem proper. Notice of such levy must be given and such proceedings had for the collection of the same as is provided in Chap. II, Tit. I, of this Part, for the collection of assessments. The entire capital stock in cash must be paid in within twelve months from the filing of the articles of incorporation, and no policy of insurance must be issued or risk taken until twenty-five per cent. of the whole capital stock is paid up.

Payment of  
subscriptions.

Capital to be  
all paid in  
twelve  
months.

Stats. 1865-6, 743, Sec. 5.

**SEC. 425.** The President and a majority of the Directors must, within thirty days after the payment of the twenty-five per cent. of the capital stock, and also within thirty days after the payment of the last instalment or assessment of the capital stock limited and fixed, prepare, subscribe and swear to a certificate setting forth the amount of the fixed capital and the amount thereof paid up at the times respectively in this section named, and file the same in the office of the County Clerk of the county where the principal office of the corporation is located,

Certificate of  
capital stock  
paid up to be  
filed, and  
when.

and a duplicate thereof, similarly executed, with the Insurance Commissioner.

Stats. 1865-6, 743, Sec. 10.

Property  
which may  
be insured.

SEC. 426. Every corporation formed for fire and marine insurance, or either of such objects, may make insurance upon vessels, freight, money, treasure, goods and effects, and upon money lent upon bottomry and respondentia, and upon other interests lawfully insurable; and they may also make insurance against fire on any dwelling house or other building, and on merchandise or other property, wherever situated; and they may cause themselves to be reinsured, at the discretion of the officers thereof.

Stats. 1865-6, 743, Sec. 8.

Funds may  
be invested,  
how.

SEC. 427. Every fire and marine insurance company has power, either by its Board of Directors or by its Finance or Executive Committee, as the by-laws may direct, to invest its funds in loans upon real estate or personal securities, or by purchases of stocks, bonds or other securities, but no loan must be made on the stock of the company as security.

[New section.]

NOTE.—This new section was suggested by the San Francisco Board of Underwriters.

Rate of risk.

SEC. 428. Fire and marine insurance corporations must never take, on any one risk, whether it is a marine insurance or an insurance against fire, a sum exceeding one-tenth part of their capital actually paid in, without reinsuring the excess above one-tenth.

Stats. 1865-6, 747, Sec. 15.

Amounts to  
be reserved  
before  
making  
dividends.

SEC. 429. No corporation transacting fire, marine or inland insurance business under the laws of this State, must make any dividends, except from profits remaining on hand after retaining, unimpaired—

1. The entire subscribed capital stock.
2. All the premiums received or receivable on outstanding marine or inland risks, except marine time risks.
3. A fund equal to one-half of the amount of all premiums on fire risks and marine time risks not terminated at the time of making such dividend.
4. A sum sufficient to pay all losses reported, or in

course of settlement, and all liabilities for expenses and taxes.

Stats. 1867-8, 328, Sec. 8.

Sec. 430. No fire, marine or inland insurance corporation, with a subscribed capital of less than two hundred thousand dollars, must declare any dividends, except from profits remaining on hand after reserving—

Amounts to be reserved by companies with less than two hundred thousand dollars capital.

1. A sum necessary to form, with the subscribed capital stock, the aggregate sum of two hundred thousand dollars.

2. All the premiums received or receivable on outstanding marine or inland risks, except marine time risks.

3. A fund equal to one-half the amount of all premiums on fire risks and marine time risks not terminated at the time of making such dividend.

4. A sum sufficient to pay all losses reported or in course of settlement, and all liabilities for expenses and taxes.

Stats. 1867-8, 328, Sec. 9.

### CHAPTER III.

#### MUTUAL LIFE, HEALTH AND ACCIDENT INSURANCE CORPORATIONS.

Section 437. Capital stock. Guarantee Fund.

438. Of what Guarantee Fund shall consist.

439. What constitutes, and deficiency in fixed capital.

440. Declaration of fixed capital to be filed.

441. Guarantee notes and interest, how disposed of.

442. Insured to be entitled to vote, when.

443. May invest in what securities.

444. Number of Directors may be altered, how.

445. Limitations to the holding of stock and in other particulars may be provided for in by-laws.

446. Premiums, how payable.

447. Corporations to furnish Insurance Commissioner with valuation of policies outstanding, when. How estimated.

448. No stamp required on accident insurance contract.

Sec. 437. Every corporation formed for the purpose of mutual insurance on the lives, or any period less than life, of persons, on the health or against accidents to them, for life or any fixed period of time, or to purchase and sell annuities, must have a capital stock of not less

Capital stock

(Guarantee  
Fund.

than one hundred thousand dollars. It must not make any insurance upon any risk or transact any other business as a corporation until its capital stock is fully paid up in cash, nor until it has also obtained a fund, to be known as a "Guarantee Fund," of not less than two hundred and fifty thousand dollars, as is hereinafter provided. If more than the requisite amount is subscribed, the stock must be distributed pro rata among the subscribers. Any subscription may be rejected by the Board of Directors or the committee thereof, either as to the whole or any part thereof, and must be, so far as rejected, without effect.

Stats. 1865-6, 753, 755, Secs. 1, 8.

Of what  
(Guarantee  
Fund shall  
consist.

SEC. 439. The Guarantee Fund mentioned in the preceding section must consist of the promissory notes of solvent parties, approved by the Board of Directors and by each other, payable to the corporation or its order, and at such times, in such modes and in such sums, with or without interest, and conformable in all other respects to such requirements as the Board of Directors prescribe; but the amount of the notes given by any one person must not exceed in the whole the sum five thousand dollars, exclusive of interest. Such notes must be payable absolutely and at the option of the corporation; they must be negotiable, and may be indorsed and transferred, or converted into cash, or otherwise dealt with by the corporation, at its discretion, without reference to any contingency of losses or expenses. Such notes, or the proceeds thereof, must remain with the corporation as a fund for the better security of its dealers, and constitute the assets of the corporation, liable for all its debts, obligations and indebtedness next after its assets from premiums and other sources, exclusive of capital stock, until the net earnings, over and above its expenses, losses and liabilities, shall have accumulated in cash, or securities in which the net earnings have been invested, to a sum which, with the capital stock, is equal to the aggregate of the original amounts of the Guarantee Fund and of the capital stock.

Stats. 1865-6, 755, Sec. 9.

What con-  
stitutes, and  
deficiency in  
fixed capital

SEC. 439. The sum accumulated as provided in the preceding section, together with the capital stock, shall

*Miller*



become and remain the fixed capital of the corporation, not subject to division among the stockholders or parties dealing with it, or to be expended in any manner otherwise than may be required in payment of the corporation's debts and actual expenses, until the business of the corporation is closed, its debts paid, and its outstanding policies and obligations of every kind cancelled or provided for; and if from any cause a deficiency at any time occurs in such fixed capital, no further division of profits shall take place until such deficiency has been made up.

Stats. 1865-6, 755, Sec. 9.

Sec. 440. Whenever the fixed capital of the corporation is obtained as hereinbefore provided, the President of the corporation and its Actuary, or its Secretary, if there is no Actuary, must make a declaration in writing, sworn to before some Notary Public, of the amount of such fixed capital, and of the particular kinds of property composing the same, with the nature and amount of each kind, which must be filed with the original articles of incorporation, and a copy, certified by the County Clerk, must be published for at least four weeks, in a newspaper published in the place where the principal office of the corporation is situated. Upon the filing of such declaration the Guarantee Fund is discharged of its obligations, and all notes of the fund remaining in the control of the corporation, and not affected by any lien thereon, or claim in that nature, must be surrendered by it to the makers thereof, respectively, or other parties entitled to receive the same.

Declaration  
of fixed capital to be  
filed.

Stats. 1865-6, 756, Sec. 10.

Sec. 441. Until the Guarantee Fund is discharged from its obligations, as provided in the preceding section, no note must be withdrawn from the fund, unless another note of equal solvency is substituted therefor, with the unanimous approval of the Board of Directors then in office, and of all other parties liable on the rest of the notes comprising the Guarantee Fund. The corporation must allow a commission of five per cent. per annum on all such guarantee notes while outstanding, and also interest on all moneys paid on such notes by the parties liable thereon, at the rate of twelve per cent. per annum, payable half yearly, until repaid by the corporation. But

Guarantee  
notes and  
interest, how  
disposed of.

such rate of interest may, from time to time, at intervals of not less than one year, be increased or reduced by the Board of Directors, so as to conform to the then current rates of interest.

Stats. 1865-6, 756, Sec. 10.

Insured to  
be entitled  
to vote,  
when.

SEC. 442. After the filing of the declaration of the fixed capital, as in this article provided, the holders of policies of life insurance for the term of life, on which the premiums are not in default, may vote at the election of Directors, and have one vote for each one thousand dollars insured by their policies, respectively.

Stats. 1865-6, 754, Sec. 5.

May invest  
in what  
securities.

SEC. 443. The number of Directors specified in the articles of incorporation may be altered from time to time, during the existence of the corporation, by resolution, at the annual meeting of a majority of those entitled to vote at the election of Directors, but the number must never be reduced below seven.

Stats. 1865-6, 754, Sec. 5.

Number of  
Directors  
may be  
altered, how.

SEC. 444. Life, health and accident insurance corporations may invest their capital stock as follows :

1. In loans upon unencumbered and improved real estate within the State of California, which shall be worth at the time of the investment at least fifty per cent. more than the sum loaned.

2. In the purchase of or loans upon interest-bearing stocks, bonds and other securities of the United States, and of the States thereof.

3. In the purchase of or loans upon interest-bearing bonds of any incorporated city, or city and county in the State of California.

4. In the purchase of or loans upon any stocks of companies and corporations formed under the laws of this State, *except mining stocks* ; which shall have, at the time of the investment, a value, in the City and County of San Francisco, of not less than sixty per cent. of their par value, and which shall be rated as first class securities.

But no loans shall be made on any securities specified in Subds. 2, 3 and 4, of this section, in any amount beyond seventy-five per cent. of the market value of the securi-

ties, nor shall any loan be made on the stock of the corporation making the loan.

Stats. 1867-8, 661; 1865-6, 748, Sec. 18.

NOTE.—The exception of mining stocks is here made to conform to what was evidently the intention of the Legislature, but which, as printed in the statutes, was grossly perverted and reversed.

SEC. 445. The corporation may, by its by-laws, limit the number of shares which may be held by any one person, and make such other provisions for the protection of the stockholders and the better security of those dealing with it, as to a majority of the stockholders may seem proper, not inconsistent with the provisions of this Title or Part.

Limitations to the holding of stock and in other particulars may be provided for in by-laws.

Stats. 1865-6, 754, Sec. 7.

SEC. 446. All premiums must be payable wholly in cash, or one-half or a greater proportion in cash, and the remainder in promissory notes bearing interest, as may be provided for by the by-laws. Agreements and policies of insurance made by the corporation may be upon the basis of full or partial participation in the profits, or without any participation therein, as may be provided by the by-laws and agreed between the parties.

Premiums, how payable.

Stats. 1865-6, 758, Sec. 16.

SEC. 447. Every life insurance corporation doing business in this State, or formed under the provisions of this Part, must, on or before the first Monday in January of each year, furnish the Insurance Commissioner the necessary data for determining the valuation of all its policies outstanding on the thirty-first day of December next preceding; which valuation must be based upon the rate of mortality as established by the American experience life table. The rate of interest to be assumed must be four and one-half per cent. per annum.

Corporations to furnish Insurance Commissioner with valuation of policies outstanding, when.

How estimated.

Stats. 1870, 859, Sec. 1.

NOTE.—This section will, in the bill prepared for the Legislature, be also placed in the chapter on *Insurance Commissioner*. The first section of this chapter requires all corporations doing the business of insurance to be governed by the provisions of the chapter on *Insurance Commissioner*.

No stamp  
required on  
accident  
insurance  
contract.

**SEC. 448.** No stamp is required nor stamp duty exacted on any contract of insurance, when such contract insures against accident which may result in injury or death.

Stats. 1865-6, 171, Sec. 1.

**NOTE.**—This chapter has been examined by the San Francisco Board of Underwriters, their proposed amendments have been incorporated, and, as presented, is approved by them.

## TITLE III.

### RAILROAD CORPORATIONS.

#### CHAPTER I. OFFICERS AND CORPORATE STOCK.

##### II. ENUMERATION OF POWERS.

##### III. BUSINESS, HOW CONDUCTED.

### CHAPTER I.

#### OFFICERS AND CORPORATE STOCK.

**SECTION 453.** Directors to be elected, when.

454. Assessments of stock, how made and collected.

455. Additional provisions in assessment and transfer of stock.

456. Corporations may borrow money and issue bonds. Limitation of amount.

457. To provide a Sinking Fund to pay bonds.

458. Capital stock to be fixed.

459. Certificate of payment of fixed capital stock.

Directors to  
be elected,  
when.

**SEC. 453.** Directors of railroad corporations may be elected at a meeting of the stockholders other than the annual meeting, as a majority of the fixed capital stock may determine, or as the by-laws may provide, or as may be declared in the articles of incorporation; notice thereof to be given as provided for notices of meetings to adopt by-laws, in Art. II, Chap. I, of this Part.

Stats. 1870, 577, Sec. 1.

Assessments  
of stock, how  
made and  
collected.

**SEC. 454.** The Directors of railroad corporations may, by order, demand and call in from the stockholders, at such times as they may deem proper, the sums by them

subscribed to the capital stock, in equal instalments of not more than ten per cent per month, unless in the articles of incorporation it is otherwise stipulated. Assessments to be levied and collected as provided in Chap. II, Tit. I, of this Part.

Stats. 1861, 613, Sec. 13 ; 1863, 610, Sec. 4.

SEC. 455. No stock in any railroad corporation is transferable until all the previous calls or instalments thereon have been fully paid in, nor is any such transfer valid except as between the parties thereto, unless at least twenty per cent. has been paid thereon and certificates issued therefor, and the transfer approved by the Board of Directors.

Additional provisions in assessment and transfer of stock.

Stats. 1861, 607, Sec. 12 ; 1863, 613, Sec. 3.

SEC. 456. Railroad corporations may borrow, on the credit of the corporation, and under such regulations and restrictions as the Directors thereof, by unanimous concurrence, may impose, such sums of money as may be necessary for constructing and completing their railroad, and may issue and dispose of bonds or promissory notes therefor, in denominations of not less than five hundred dollars, and at a rate of interest not exceeding ten per cent. per annum ; may also issue bonds or promissory notes of the same denomination and rate of interest, in payment of any debts or contracts for constructing and completing their road, with its equipments and all else relative thereto. The amount of bonds or promissory notes issued for such purposes must not exceed, in all, the amount of their capital stock ; and to secure the payment of such bonds or notes, they may mortgage their corporate property and franchise.

Corporations may borrow money and issue bonds.

Limitation of amount.

Stats. 1861, 610 ; Sec. 15 ; 1862, 547, Sec. 1.

SEC. 457. The Directors must provide a Sinking Fund, to be specially applied to the redemption of such bonds, on or before their maturity, and may also confer on any holder of any bond or note so issued, for money borrowed, or in payment of any debt or contract for the construction and equipment of such road, the right to convert the principal due or owing thereon, into stock of such corporation, at any time within eight years from the date

To provide a Sinking Fund to pay bonds.

of such bonds, under such regulations as the Directors may adopt.

Stats. 1861, 610, Sec. 15 ; 1862, 547, Sec. 1.

Capital stock  
to be fixed.

SEC. 458. When, at any time after filing the articles of incorporation, it is ascertained that the capital stock therein set out is either more or less than actually required for constructing, equipping, operating and maintaining the road, by a two-third vote of the stockholders the capital stock must be fixed, and a certificate thereof, and of the proceedings had to fix the same, must be made out and filed in the office of the Secretary of State.

Stats. 1861, 610, Sec. 6.

Certificates  
of payment  
of fixed  
capital stock

SEC. 459. Within thirty days after the payment of the last instalment of the fixed capital stock of any railroad corporation, organized under this Title and Part, the President and Secretary, and a majority of the Directors thereof, must make, subscribe and file in the office of the Secretary of State a certificate, stating the amount of the fixed capital stock and that the whole thereof has been paid in. The President and Secretary must swear to the truth of the certificate before filing the same.

Stats. 1861, 610, Sec. 16.

## CHAPTER II.

### ENUMERATION OF POWERS.

#### SECTION 465. Enumeration of powers.

1. To survey road.
  2. May accept real estate.
  3. May acquire real estate.
  4. Lay out road, how wide.
  5. Where may construct road.
  6. May cross or connect roads.
  7. May purchase land, timber, stone, gravel, etc.
  8. Carry persons and freight.
  9. Erect necessary buildings.
  10. Regulate time and freights, subject to legislation.
  11. Regulate force and speed.
  12. Subject to Tit. I of this Part.
466. Map and profile to be filed.
467. May change line of road.
468. Forfeiture of franchise.
469. Crossings and intersections. Condemnation.

**Section 470.** Not to use streets, alleys or water, in cities or towns, except by a two-third vote of the city or town authorities.

**471.** Railroads through cities not to charge fare to and from points therein.

**472.** When crossing railroads or highways, how other lands are acquired.

**473.** Corporations may consolidate. Publication of notice. Copy to be filed.

**Sec. 465.** Every railroad corporation has power—

1. To cause such examination and surveys to be made as may be necessary to the selection of the most advantageous route for the railroad; and for such purposes, their officers, agents and employes, may enter upon the lands or waters of any person, subject to liability for all damages which they do thereto.

Enumera-  
tion of  
powers.  
To survey  
road.

2. To receive, hold, take and convey, by deed or otherwise, as a natural person, such voluntary grants and donations of real estate and other property which may be made to it, to aid and encourage the construction, maintenance and accommodation of such railroad.

May accept  
real estate.

3. To purchase, or by voluntary grants or donations to receive, enter, take possession of, hold and use all such real estate and other property, as may be absolutely necessary for the construction and maintenance of such railroad, and for all stations, depots and other purposes, necessary to successfully work and conduct the business of the road.

May acquire  
real estate.

4. To lay out its road not exceeding nine rods wide, and to construct and maintain the same with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same.

Lay out road,  
how wide.

5. To construct their road across, along or upon any stream of water, water course, roadstead, bay, navigable stream, street, avenue or highway, or across any railway, canal, ditch or flume, which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or water course, road, street, avenue, highway, railroad, canal, ditch or flume thus intersected, to its former state of usefulness, as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise.

Where may  
construct  
road.

6. To cross, intersect, join or unite its railroad with any other railroad, either before or after construction, at

May cross or  
connect  
roads.

any point upon its route, and upon the grounds of such other railroad corporation, with the necessary turnouts, sidings and switches, and other conveniences in furtherance of the objects of its connections; and every corporation whose railroad is, or shall be hereafter, intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant facilities therefor; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of such crossings, intersections and connections, the same shall be ascertained and determined as is provided in Tit. VII, Part III, CODE OF CIVIL PROCEDURE.

May purchase land, timber, stone, gravel, etc.

7. To purchase lands, timber, stone, gravel or other materials, to be used in the construction and maintenance of its road and all necessary appendages and adjuncts, or acquire them in the manner provided in Tit. VII, Part III, CODE OF CIVIL PROCEDURE, for the condemnation of lands; and to change the line of its road, in whole or in part, whenever a majority of the Directors so determine, as is provided hereinafter; but no such change must vary the general route of such road, as contemplated in its articles of incorporation.

Carry persons and freight.

8. To carry persons and property on their railroad, and receive tolls or compensation therefor.

Erect necessary buildings.

9. To erect and maintain all necessary and convenient buildings, stations, depots, fixtures and machinery, for the accommodation and use of their passengers, freight and business.

Regulate time and freights, subject to legislation.

10. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor, subject to be altered, changed or amended by the Legislature at any time.

Regulate force and speed.

11. To regulate the force and speed of their locomotives, cars, trains or other machinery used and employed on their road, and to establish, execute and enforce all needful and proper rules and regulations for the management of its business transactions, usual and proper for railroad corporations.

Subject to Tit. I of this Part.

12. To possess all the powers and be subject to all the provisions of Tit. I of this Part, so far as the same are not in conflict or inconsistent with the provisions of this Title.



Sec. 466. Every railroad corporation in this State must, within a reasonable time after its road is finally located, cause to be made a map and profile thereof, and of the land acquired for the use thereof, and the boundaries of the several counties through which the road may run, and file the same in the office of the Secretary of State; and also like maps of the parts thereof located in different counties, and file the same in the office of the Clerk of the county in which such parts of the road are, there to remain of record forever. The maps and profiles must be certified by the Chief Engineer, the Acting President and Secretary of such company, and copies of the same, so certified and filed, be kept in the office of the Secretary of the corporation, subject to examination by all parties interested.

Map and  
profile to be  
filed.

Stats. 1861, 621, Sec. 34.

Sec. 467. If, at any time after the location of the line of the railroad, and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved, the Directors may, as provided in Subd. 7, Sec 465, alter or change the same, and cause new maps and profiles to be filed, showing such changes, in the same offices where the originals are of file, and may proceed, in the same manner as the original location was acquired, to acquire and take possession of such new line, and must sell or relinquish the lands owned by them for the original location, within five years after such change. No new location, as herein provided, must be so run as to avoid any points named in their articles of incorporation.

May change  
line of road.

Stats. 1861, 616, Sec. 18.

Sec. 468. Every railroad corporation must, within two years after filing its original articles of incorporation, begin the construction of its road, and must every year thereafter complete and put in full operation at least five miles of its road, until the same is fully completed; and upon its failure so to do, for the period of one year, its right to extend its road beyond the point then completed is forfeited.

Forfeiture  
of franchise.

Stats. 1861, 626, Sec. 54; 1870, 678, Sec. 2.

Sec. 469. Whenever the track of one railroad intersects or crosses the track of another railroad, whether

Crossings  
and inter-  
sections.

Condemnation.

the same be a street railroad wholly within the limits of a city or town, or other railroad, the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible; and, in case the persons or corporations owning the railroads cannot agree as to the compensation to be made for cutting and adjusting the rails, the condemnation of the right of way over the one for the use of the other road may be had in proceedings under Tit. VII, Part III, CODE OF CIVIL PROCEDURE, and the damages assessed and the right of way granted as in other cases.

Stats. 1862, 498, Sec. 2.

Not to use streets, alleys or water, in cities or towns, except by a two-third vote of the city or town authorities.

SEC. 470. No railroad corporation must use any street, alley or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-third vote of the town or city authority from which the right must emanate.

NOTE.—This is a limitation upon Sec. 367, general provisions of corporations.

Railroads through cities not to charge fare to and from points therein.

SEC. 471. No railroad corporation, other than street railroads, availing itself of the provisions of the preceding section and acquiring right of way from city authorities, shall ever use their road for street railroad purposes, or for the purpose of carrying passengers for a consideration, from any point to another in the same city.

Stats. 1861, 618, Sec. 21.

When crossing railroads or highways, how other lands are acquired.

SEC. 472. Whenever the track of such railroad crosses a railroad or highway, such railroad or highway may be carried under, over or on a level with the track, as may be most expedient; and in cases where an embankment or cutting necessitates a change in the line of such railroad or highway, the corporation may take such additional lands and material as are necessary for the construction of such road or highway on such new line. If such other necessary lands cannot be had otherwise, they may be condemned as provided in Tit. VII, Part III, CODE OF CIVIL PROCEDURE, and when compensation is made therefor, the same becomes the property of the corporation.

Stats. 1861, 617, Sec. 19.

Sec. 473. Two or more railroad corporations may consolidate their capital stock, debts, property, assets and franchises, in such manner as may be agreed upon by their respective Boards of Directors. No such amalgamation or consolidation must take place without the written consent of the holders of three-fourths in value of all the stock of each corporation; and no such amalgamation or consolidation must, in any way, relieve such corporation or the stockholders thereof from any and all just liabilities. In case of such amalgamation or consolidation, due notice of the same must be given, by advertisement for one month, in at least one newspaper in each county, if there be one published therein, into or through which such roads run, and also for the same length of time in one paper published in Sacramento, and in two papers published in San Francisco; and when the consolidation and amalgamation is completed, a copy of the new articles of incorporation must be filed in the office of the Secretary of State.

Corporations  
may consoli-  
date.

Publication  
of notice.

Copy to be  
filed.

Stats. 1861, 622, Sec. 40.

## CHAPTER III.

### BUSINESS, HOW CONDUCTED.

SECTION 479. Checks to be affixed to all baggage. Damages.

480. Annual report to be verified. Form of report.

481. Duties of corporation.

482. Corporation to pay damages for refusal.

483. Furnish room inside passenger cars, and be responsible for damages occurring on freight and other cars.

484. Corporations to post printed regulations, and not responsible for damages in violation of rules.

485. To pay damages. Not liable in certain cases. Corporation may recover damages, when.

486. Regulations of trains. Penalty.

487. Conductor may eject passengers, when.

488. Officers to wear badge.

489. Rates of charges.

490. Passenger tickets, how issued and to be good for six months.

491. Character of iron to be used.

Sec. 479. A check must be affixed to every package or parcel of baggage, when taken for transportation by any agent or employé of such railroad corporation, and a

Checks to be  
affixed to all  
baggage

Damages.

duplicate thereof given to the passenger or person delivering the same in his behalf; and if such check is refused on demand, the railroad corporation must pay to such passenger the sum of twenty dollars, to be recovered in an action for damages; and no fare or toll must be collected or received from such passenger, and if such passenger has paid his fare, the same must be returned by the conductor in charge of the train; and on producing the check, if his baggage is not delivered to him by the agent or employé of the railroad corporation, he may recover the value thereof from the corporation.

Stats. 1861, 623, Sec. 42.

Annual report to be verified.

Sec. 480. Every railroad corporation must make an annual report to the Secretary of State, or other officer designated by law, of its operations for each year, ending on the thirty-first day of December, verified by the oaths of the President or Acting Superintendent of operations, the Secretary and Treasurer of such corporation, and file it in the office of the Secretary of State or such other designated officer by the twentieth day of February, which must state—

Form of report.

1. The capital stock and the amount thereof actually paid in.

2. The amount expended for the purchase of lands for the construction of the road, for buildings, and for engines and cars, respectively.

3. The amount and nature of its indebtedness, and the amount due the corporation.

4. The amount received from the transportation of passengers, property, mails and express matter, and from other sources.

5. The amount of freight, specifying the quantity in tons.

6. The amount paid for repairs of engines, cars, buildings, and other expenses, in gross, showing the current expenses of running such road.

7. The number and amount of dividends, and when paid.

8. The number of engine houses and shops, of engines and cars, and their character.

A report must also be made to the Governor and Surveyor-General of the State, as required by Chap. III, Title on *Public Ways*, POLITICAL CODE.

Stats. 1861, 624, Sec. 44.

**Sec. 481.** Every such corporation must start and run their cars, for the transportation of persons and property, at such regular times as they shall fix by public notice, and must furnish sufficient accommodations for the transportation of all such passengers and property as, within a reasonable time previous thereto offer, or is offered, for transportation, at the place of starting, at the junction of other railroads, and at siding and stopping places established for receiving and discharging way passengers and freight; and must take, transport and discharge such passengers and property at, from and to such places, on the due payment of tolls, freight or fare therefor.

Duties of corporation.

Stats. 1861, 624, Sec. 45.

**Sec. 482.** In case of refusal by such corporation or their agents so to take and transport any passengers or property, or to deliver the same, at the regular appointed places, such corporation must pay to the party aggrieved all damages which is sustained thereby, with costs of suit.

Corporation to pay damages for refusal.

Stats. 1861, 624, Sec. 46.

**Sec. 483.** Every railroad corporation must furnish, on the inside of its passenger cars, sufficient room and accommodations for all passengers to whom tickets are sold for any one trip, and for all persons presenting tickets entitling them to travel thereon; and when fare is taken for transporting passengers on any baggage, wood, gravel or freight car, the same care must be taken and the same responsibility is assumed by the corporation as for passengers on passenger cars.

Furnish room inside passenger cars, and be responsible for damages occurring on freight and other cars.

[New section.] Stats. 1861, 625, Sec. 48.

**Sec. 484.** Every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel or freight car, in violation of such printed regulations, or in violation of positive verbal instructions or injunctions given to such passenger in person by any officer of the train, the corporation is not responsible for damages for such injuries, unless the cor-

Corporations to post printed regulations, and not responsible for damages in violation of rules.

poration failed to comply with the provisions of the preceding section.

[New section.]      Stats. 1861, 625, Sec. 48.

To pay damages.

Not liable in certain cases

Corporation may recover damages, when.

Regulations of trains.

Penalty.

SEC. 485. Railroad corporations must make and maintain a good and sufficient fence on either, or both sides, of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals, upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. Railroad corporations paying to the owner of the land through or along which their road is located an agreed price for making and maintaining such fence, or paying the cost of such fence with the award of damages allowed for the right of way for such railroad, are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who thus fail to construct and maintain such fence; and the owners of such animals are responsible for any damages or loss which may accrue to such corporation from such animals being upon their railroad track, resulting from the non-construction of such fence, unless it is shown that such loss or damage occurred through the negligence or fault of the corporation, its officers, agents or employés.

Stats. 1861, 623, Sec. 40.

SEC. 486. A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed such street, road or highway, under a penalty of one hundred dollars for every neglect, to be paid by the corporation owning the railroad, which may be recovered in an action prosecuted by the District Attorney of the proper county, for the use of the State. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, train or cars, when the provisions of this section are not complied with.

Stats. 1861, 623, Sec. 41.

**SEC. 487.** If any passenger neglects or refuses to prepay his fare or toll upon demand, the conductor of the train or the employes of the corporation may put him out of the cars at any stopping place the conductor may elect, unless the passenger pays or tenders him an amount at least ten per cent. more than the fixed fare not so prepaid.

Conductor  
may eject  
passengers,  
when.

Stats. 1861, 626, Sec. 49.

**SEC. 488.** Every conductor, baggage-master, engineer, brakeman or other employe of any railroad corporation, employed on a passenger train or at stations for passengers, must wear upon his hat or cap, or in some conspicuous place on the breast of his coat, a badge, indicating his office or station, and the initial letters of the name of the corporation by which he is employed. No collector or conductor, without such badge, is authorized to demand or to receive, from any passenger, any fare, toll or ticket, or exercise any of the powers of his office or station; and no other officers or employes, without such badge, has any authority to meddle or interfere with any passenger or property.

Officers to  
wear badge.

Stats. 1861, 626, Sec. 50.

**SEC. 489.** All railroad corporations must fix and publish their rates of charges for freightage and fares from one depot to another, on their various lines of road in this State, graded as follows:

Rates of  
charges.

1. One rate of charges per mile for a distance of one hundred miles or over.
2. One rate for a distance of seventy-five and less than one hundred miles, charging not exceeding ten per cent. per mile more than the first rate.
3. One rate for a distance of fifty and less than seventy-five miles, charging not exceeding fifteen per cent. per mile more than the first rate.
4. One rate for a distance of twenty-five and less than fifty miles, charging not exceeding twenty per cent. per mile more than the first rate.
5. One rate for a distance not exceeding twenty-five miles, charging not exceeding twenty-five per cent. per mile more than the first rate.

But in no case, nor in any class of charges hereinbefore named, shall any railroad corporation charge or receive

more than ten cents per mile for each passenger, nor fifteen cents per mile for each ton of freight, transported on its road. For every transgression of these limitations the corporation is liable to the party suffering thereby treble the entire amount of fare or freightage so charged to such party. In no case is the corporation required to receive less than twenty-five cents for any one lot of freight for any distance.

[New section.] Stats. 1861, 626, Sec. 51.

**NOTE.**—The provision fixing grades of charges is in accordance with the statutes of the States of Maine, Missouri, Kansas and others, and frequent suggestions in this State. In Kansas and Missouri six cents per mile is the maximum charge for passenger fare, and freightage is graded something like the provisions of this section. We have not disturbed the existing law fixing a maximum of freightage and fares, but, to produce a systematic uniformity, require grades to be fixed based upon distance alone. It would be clearly a wrong to allow a charge for one hundred miles to be doubled for an intermediate distance of fifty miles.

Passenger tickets, how issued and to be good for six months.

**SEC. 490.** Every railroad corporation must provide, and on being tendered the fare therefor fixed as provided in the preceding section, furnish to every person desiring a passage on their passenger cars a ticket which entitles the purchaser to a ride, and to the accommodations provided on their cars, from the depot or station where the same is purchased to any other depot or station on the line of their road. Every such ticket entitles the holder thereof to ride on their passenger cars to the station or depot of destination, or any intermediate station designated in the ticket, at any time within six months thereafter. Any corporation failing so to provide and furnish tickets, or refusing the passage which the same calls for when sold, must pay to the person so refused the sum of two hundred dollars.

[New section.]

**NOTE.**—The change here proposed makes a ticket for which value has been paid by a holder available at any time within six months. No good reason can be assigned why passengers should not be protected as well as others against inevitable accidents. A slight inconvenience to a corporation ought not to deprive one of small means of all consideration or convenience.

Character of iron to be used.

**SEC. 491.** All railroads, other than street railroads and those used exclusively for carrying freight or for



mining purposes, built by corporations organized under this chapter, must be constructed of the best quality of iron rail, known as T rail or H rail, or other pattern of equal utility.

Stats. 1861, 626, Sec. 57 ; 1862, 498, Sec. 1.

## TITLE IV.

### STREET RAILROAD CORPORATIONS.

- SECTION 497.** Authority to lay street railroad track, how obtained,  
 498. Restrictions and limitations to the grant of the right of way.  
 499. May make further regulations and rules.  
 500. Penalty for overcharging.  
 501. To provide and furnish passenger tickets. Penalty.  
 502. Trial, proof and limitation.  
 503. City or town to reserve certain rights.  
 504. License to be paid to city or town.  
 505. Track for grading purposes.  
 506. What provisions of Tit. III are applicable to street railroads.

**SEC. 497.** Authority to lay railroad tracks through the streets and public highways of any incorporated city or town may be obtained, for a term of years not exceeding fifty, from the Trustees, Council or other body to whom is entrusted the government of the city or town, under such restrictions and limitations, and upon such terms and payment of license, as the city or town authority may provide. In no case must permission be granted to propel cars upon such tracks otherwise than by horses or mules, unless for special reasons, as hereinafter provided.

Authority to lay street railroad track, how obtained.

Stats. 1870, 481, Sec. 1.

**SEC. 498.** The city or town authorities, in granting the right of way to street railroad corporations, in addition to the restrictions which they are authorized to impose, must require them—

Restrictions and limitations to the grant of the right of way.

1. To construct their tracks on those portions of streets designated in the ordinance granting the right, which must be as nearly as possible in the middle thereof.

2. To plank, pave or macadamize the entire length of the street used by their track, between the rails and for

two feet on each side thereof, and to keep the same constantly in repair and with good crossings.

3. That the tracks must not be more than five feet wide within the rails, and a space between the track sufficient to allow the cars to pass each other freely.

4. Two corporations may be permitted to use the same street, each paying an equal portion for the construction of the track; but in no case must two railroads occupy and use the same street or track for a distance of more than five blocks.

5. Any proposed railroad track may be permitted to cross any track already constructed, the crossing being made as provided in Chap. II, Tit. III, of this Part.

6. In laying down track and preparing therefor, not more than one block must be obstructed at any one time, nor for a longer period than ten working days.

7. The rates of fare on the cars must not exceed ten cents for one fare, for any distance under three miles.

8. The cars must be of the most approved construction for comfort and convenience of passengers, and provided with brakes to stop the same when required.

9. The rate of speed must not be greater than eight miles per hour. A violation of this provision subjects the corporation to a fine of one hundred dollars for each offence.

10. Work to construct the railroad must be commenced within one year from the date of the ordinance granting the right of way and the filing of articles of incorporation, and the same completed within three years thereafter. A failure to comply with these provisions works a forfeiture of the right of way as well as of the franchise, unless the uncompleted portion is abandoned by the corporation, with the consent of the authorities granting the right of way, such abandonment and consent to be in writing.

Stats. 1870, 482, Secs. 1, 6; 1863, 296, Sec. 1.

May make  
further reg-  
ulations and  
rules.

SEC. 499. Cities and towns, in or through which street railroads run, may make such further regulations for the government of such street railroads as may be necessary to a full enjoyment of the franchise and the enforcement of the conditions provided herein.

Stats. 1870, 483, Sec. 10.

**SEC. 500.** Any corporation, or agent or employé thereof, demanding or charging a greater sum of money for fare on the cars of such street railroad than that fixed, as provided in this Title, forfeits to the person from whom such sum is received, or who is thus overcharged, the sum of two hundred dollars, to be recovered in a civil action, in any Justice's Court having jurisdiction thereof, against the corporation.

Penalty for overcharge.  
i.e.

Stats. 1863, 297, Sec. 1.

**SEC. 501.** Every street railroad corporation must provide, and, on request, furnish to all persons desiring a passage on their cars, any required quantity of passenger tickets or checks, each to be good for one ride. Any corporation failing so to provide and furnish tickets or checks to any person desiring to purchase the same, at not exceeding the rate hereinbefore fixed, must pay to such person the sum of two hundred dollars, to be recovered as provided in the preceding section.

To provide and furnish passenger tickets.

Penalty.

Stats. 1863, 297, Sec. 1.

**SEC. 502.** Upon the trial of any action for the forfeiture named in the two preceding sections, proof that the person demanding or receiving such sum of money as fare, or for the sale of such ticket or check, was, at the time of making such demand or receiving such moneys, engaged on or at any car, omnibus or vehicle of any railroad belonging to such corporation, is prima facie evidence that such person so demanding or receiving such moneys was the agent, servant or employé of the corporation so owning, using or employing such railroad. The suit must be instituted within thirty days from and after the cause of action shall have accrued.

Trial, proof and limitation.

Stats. 1863, 297, Secs. 3, 5.

**SEC. 503.** Every city, town, or city and county, granting the right to construct street railroads within its limits, must reserve the right to grade, sewer, pave, macadamize or otherwise improve, alter or repair the streets or highways permitted to be used by the corporation; the work to be so done by the city or town as to obstruct the railroad as little as possible, and when such works make the

City or town to reserve certain rights.

same necessary, the corporation may shift their rails so as to avoid the obstructions made thereby.

Stats. 1870, 483, Sec. 9.

License to be  
paid to city  
or town

SEC. 504. Each street railroad corporation must pay to the authorities of the city, town, county, or city and county, as a license upon each car, such sum as the authorities may fix, not exceeding fifty dollars per annum in the City of San Francisco, nor more than twenty-five dollars per annum in other cities or towns; where any street railroad connects or runs through two or more cities or towns, a proportionate or equal share of such license must be paid to each of the cities or towns; and no such license money is due the county authorities where the same is paid to any city or town authority.

Stats. 1870, 483, Sec. 10.

Track for  
grading  
purposes.

SEC. 505. The right to lay down a track for grading purposes, and maintain the same for a period not to exceed three years, may be granted by the corporate authorities of any city or town, or Supervisors of any city or county, but no such track must remain more than three years upon any one street; and it must be laid level with the street, and must be operated under such restrictions as not to interfere with the use of the street by the public. The corporate authorities of any city or town may grant the right to use steam or any other motive power in propelling the cars used on such grading track, when public convenience or utility demands it, but the reasons therefor must be set forth in the ordinance, and the right to rescind the ordinance at any time is reserved.

Stats. 1870, 483, Sec. 11.

What provi-  
sions of Tit  
III are appli-  
cable to  
street rail-  
roads.

SEC. 506. All the provisions of Tit. III of this Part are applicable to street railroads, unless where street railroads are therein specially excepted, or the provisions are palpably inapplicable.

NOTE.—The reference is to the Title on *Railroads*, with those sections excepted which obviously cannot be applicable.

## TITLE V.

## WAGON ROAD CORPORATIONS.

**SECTION 512.** Three Commissioners to act with surveyor.

513. Survey and map to be filed, and approved by Supervisors.

514. Tolls, etc., to be collected. Penalty for taking unlawful tolls.

515. No tolls to be charged on highways or public roads.

516. Rates of toll to be posted at gate.

517. Toll-gatherer may detain persons until they pay toll.

518. Toll-gatherer not to detain any person unnecessarily.

519. Persons avoiding tolls to pay five dollars.

520. Penalties for trespasses on property of corporation.

521. When capital invested is repaid, tolls to be reduced, etc.

522. May mortgage and hypothecate corporate property.

**SEC. 512.** Three Commissioners must act in conjunction with the surveyor of the corporation, two to be appointed by the Board of Supervisors of the county through which the road is to run and one by the corporation, who must lay out the proposed road and report their proceedings, together with a map of the road, to the Supervisors who appointed them, as provided in the succeeding section.

Three Commissioners to act with surveyor.

Stats. 1853, 114, Sec. 2.

**SEC. 513.** When the route is surveyed, a map thereof must be submitted to and filed with the Board of Supervisors of each county through or into which the road runs, giving its general course and the principal points to or by which it runs, and its width, which must in no case exceed one hundred feet, and the Supervisors must either approve or reject the survey; if approved, it must be entered of record on the journal of the Board, and such approval authorizes the use of all public lands and highways over which the survey runs, but the Board of Supervisors must require the corporation, at its own expense, and the corporation must so change and open the highway so taken and used, as to make the same as good as they were before the appropriation thereof; and must so construct all crossings of public highways over and by its road, and its toll gates, as not to hinder or obstruct the use of the same.

Survey and map to be filed, and approved by Supervisors.

Stats. 1854, 74, Sec. 1.

Tolls, etc., to  
be collected.

SEC. 514. All wagon road corporations may bridge or keep ferries on streams on the line of their road, and must do all things necessary to keep the same in repair. They may take such tolls only on their road, ferries or bridges, as are fixed by the Board of Supervisors of the proper county through which the road passes or in which the ferry or bridge is situate, except that in the Counties of Trinity, Shasta, Klamath, Butte, Siskiyou, Del Norte, Plumas, Humboldt and Sierra, the Directors may fix their own tolls; but in no case must the tolls be more than sufficient to pay fifteen per cent. nor less than ten per cent. per annum on the cost of construction, after paying for repairs and other expenses for attending to the road, bridges or ferries. If tolls, other than as herein provided, are charged or demanded, the corporation forfeits its franchise and must pay to the party so charged one hundred dollars as liquidated damages.

Penalty for  
taking un-  
lawful tolls.

Stats. 1857, 280, Sec. 1.

No tolls to be  
charged on  
highways or  
public roads.

SEC. 515. When any highway or public road is taken and used by any wagon road corporation as a part of its road, the corporation must not place a toll gate or take tolls for the use of such highway or public road by teamsters, travellers, drovers or any one transporting property over the same.

Stats. 1853, 114, Sec. 3.

Rates of toll  
to be posted  
at gate.

SEC. 516. The corporation must affix and keep up, at or over each gate, or in some conspicuous place, so as to be conveniently read, a printed list of the rates of toll levied and demanded.

Stats. 1853, 176, Sec. 30.

Toll-gath-  
erer may de-  
tain persons  
until they  
pay toll.

SEC. 517. Each toll-gatherer may prevent from passing through his gate persons leading or driving animals or carriages subject to toll, until they shall have paid respectively the tolls authorized to be collected.

Stats. 1853, 176, Sec. 29.

Toll-gath-  
erer not to  
detain any  
person un-  
necessarily.

SEC. 518. Every toll-gatherer who, at any gate, unreasonably hinders or delays any traveller or passenger liable to the payment of toll, or demands and receives from any person more than he is authorized to collect, for each offence forfeits the sum of ten dollars to the person aggrieved.

Stats. 1853, 176, Sec. 31.

**SEC. 519.** Every person who, to avoid the payment of the legal toll, with his team, carriage or horse, turns out of a turnpike road or plank road, or passes any gate thereon on ground adjacent thereto, and again enters upon such road, for each offence forfeits the sum of five dollars to the corporation injured.

Persons avoiding tolls to pay five dollars.

Stats. 1853, 176, Sec. 33.

**SEC. 520.** Every person who—

1. Wilfully breaks, cuts down, defaces or injures any mile-stone or post on any turnpike or plank road; or,
2. Wilfully breaks or throws down any gate on such road; or,
3. Digs up or injures any part of such road or anything thereunto belonging; or,
4. Forcibly or fraudulently passes any gate thereon without having paid the legal toll;

Penalties for trespasses on property of corporation.

For each offence forfeits to the corporation injured the sum of twenty-five dollars, in addition to the damages resulting from his wrongful act.

Stats. 1853, 176, Sec. 32.

**SEC. 521.** The entire revenue derived from the road shall be appropriated, first, to repayment to the corporation the costs of its construction, with fifteen per cent. per annum interest thereon, together with the incidental expenses incurred in collecting tolls and keeping the road in repair. When the repayment is completed, the tolls must be so reduced as to raise no more than an amount sufficient to pay incidental expenses and to keep the road in good repair.

When capital invested is repaid, tolls to be reduced, etc.

Stats. 1853, 114, Sec. 4.

**SEC. 522.** The corporation may mortgage or hypothecate its road and other property for funds with which to construct or repair their road, but no mortgage or hypothecation is valid or binding unless at least twenty-five per cent. of the capital stock subscribed has been paid in and invested in the construction of the road and appurtenances, and then only after an affirmative vote of two-thirds of the capital stock subscribed.

May mortgage and hypothecate corporate property.

Stats. 1853, 173, Sec. 19.

## TITLE VI.

## BRIDGE, FERRY, WHARF, CHUTE AND PIER CORPORATIONS.

SECTION 528. Corporation to obtain license from Supervisors.

529. In what contingencies corporate existence ceases.

530. President and Secretary to make annual report, and what to contain. Damages for failing to report.

Corporation  
to obtain  
license from  
Supervisors.

SEC. 528. No corporation must construct or take tolls on a bridge, ferry, wharf, chute or pier, until authority is granted therefor by the Supervisors, pursuant to the provisions of the POLITICAL CODE.

In what con-  
tingencies  
corporate  
existence  
ceases.

SEC. 529. Every such corporation ceases to be a body corporate—

1. If, within six months from filing its articles of incorporation, it has not obtained authority from the Board of Supervisors, and if, within one year thereafter, it has not commenced the construction of the bridge, wharf, chute or pier, and actually expended thereon at least ten per cent. of the capital stock of the corporation.

2. If, within three years from filing the articles of incorporation, the bridge, wharf, chute or pier is not completed, as required by the POLITICAL CODE.

3. If, when the bridge, wharf, chute or pier of the corporation is destroyed, it is not reconstructed and ready for use within three years thereafter.

4. If the ferry of any such corporation is not in running order within three months after authority is obtained to establish it, or if at any time thereafter it ceases, for a like term consecutively, to perform the duties imposed by law.

Stats. 1850, 347, Sec. 169.

President  
and Secre-  
tary to make  
annual re-  
port, and  
what to  
contain.

SEC. 530. The President and Secretary of all bridge, ferry, wharf, chute and pier corporations must annually, under oath, report to the Board of Supervisors of the county in which their articles of incorporation are filed—

1. The cost of constructing and providing all necessary appendages and appurtenances for their bridge, ferry, wharf, chute or pier.

2. The amount of all moneys expended thereon, since its construction, for repairs and incidental expenses.



3. The amount of their capital stock, how much paid in and how much actually expended thereof.

4. The amount received during the year for tolls and from all other sources, stating each separately.

5. The amount of dividends made, and the indebtedness of the corporation, specifying for what it was incurred.

6. Such other facts and particulars respecting the business of the corporation as the Board of Supervisors may require.

This report the President and Secretary must cause to be published, for four weeks, in a daily newspaper published nearest the bridge, if required by order of the Board of Supervisors. A failure to make such report subjects the corporation to pay to the State two hundred dollars liquidated damages, and for every week permitted to elapse after such failure, fifty dollars damages. All such cases to be reported by the Board of Supervisors to the District Attorney, who must institute suit therefor, and the certificate of the Clerk of the Board of Supervisors of such failure is presumptive proof thereof.

Damages for  
failing to  
report.

Stats. 1850, 347, Secs. 170, 173.

## TITLE VII.

### TELEGRAPH CORPORATIONS.

**SECTION 536.** May use right of way along waters, roads and highways.

537. Persons liable for damages for injuring telegraph property.

538. Party guilty of wilful and malicious injury, liable to one hundred times actual damages.

539. Conditions on which damage to sub-aqueous cable may be recovered.

540. Duty to send paid dispatch.

541. May dispose of certain rights.

542. Rates of charges to be fixed, and how published.

**SEC. 536.** Telegraph corporations may construct lines of telegraph along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers or abutments, for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as

May use  
right of way  
along  
waters, roads  
and high-  
ways.

not to incommode the public use of the road or highway, or interrupt the navigation of the waters.

Stats. 1857, 171, Sec. 1.

Persons  
liable for  
damages for  
injuring  
telegraph  
property.

SEC. 537. Any person who injures or destroys, through want of proper care, any necessary or useful fixture of any telegraph corporation, is liable to the corporation for all damages sustained thereby. Any vessel which, by dragging its anchor or otherwise, breaks, injures or destroys the sub-aqueous cable of a telegraph corporation, subjects its owner to the damages hereinbefore specified.

Stats. 1850, 347, Sec. 152; 1857, 171, Sec. 2; 1862, 290, Sec. 8.

Party guilty  
of wilful and  
malicious  
injury, liable  
to one hun-  
dred times  
actual  
damages.

SEC. 538. Any person who wilfully and maliciously does any injury to any telegraph property mentioned in the preceding section, is liable to the corporation for one hundred times the amount of actual damages sustained thereby, to be recovered in any Court of competent jurisdiction.

Stats. 1862, 290, Sec. 8.

Conditions  
on which  
damage to  
sub-aqueous  
cable may be  
recovered.

SEC. 539. No telegraph corporation can recover damages for the breaking or injury of any sub-aqueous telegraph cable, unless such corporation has previously erected, on either bank of the waters under which the cable is placed, a monument, indicating the place where the cable lies, and publishes for one month, in some newspaper most likely to give notice to navigators, a notice, giving a description and the purpose of the monuments, and the general course, landings and termini of the cable.

Stats. 1857, 171, Sec. 3.

Duty to send  
paid dis-  
patch.

SEC. 540. Any corporation owning or working any telegraph line in this State, on the payment of the usual charges therefor, as established by its rates, must receive all dispatches from any person, and transmit the same with impartiality and good faith to the person to whom the same is directed; and for any neglect or refusal so to do, such corporation forfeits the sum of five hundred dollars, to be recovered, with costs of suit, by the person desiring to send the same.

Stats. 1850, 347, Sec. 154; 1861, 84, Sec. 5.

SEC. 541. Any telegraph corporation may at any time, with the consent of the persons holding two-thirds of the issued stock of the corporation, sell, lease, assign, transfer or convey any rights, privileges, franchises or property of the corporation, except its corporate franchise.

May dispose  
of certain  
rights.

Stats. 1861, 84, Sec. 6.

SEC. 542. Every telegraph corporation must fix uniform rates of charges proportionate to the number of miles, which must be uniform throughout the State, and publish them, by posting such rates at each of their offices in use.

Rates of  
charges to be  
fixed, and  
how pub-  
lished.

[New section.]

## TITLE VIII.

### WATER AND CANAL CORPORATIONS.

SECTION 548. Corporation may obtain contract to supply city or town.

549. Duties of corporation. Rates fixed by Commissioners.

550. Right to use streets, ways, alleys and roads.

551. To build and keep bridges in repair.

SEC. 548. No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted, by contract or otherwise, for a term exceeding fifty years.

Corporation  
may obtain  
contract to  
supply city  
or town.

Stats. 1852, 171, Sec. 3.

SEC. 549. All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water, to the extent of their means, in case of fire or other great necessity, free of charge. The rates to be

Duties of  
corporation.

Rates fixed  
by Commis-  
sioners.

charged for water must be determined by a Board of Commissioners, to be selected as follows: Two by the city and county, or city or town authorities, and two by the water company; and in case they cannot agree to the valuation they must choose a fifth member of the Board; if the four Commissioners cannot agree upon a fifth, then the County Judge of the county must appoint such fifth person. The decision of the majority of the Board determines the rates to be charged for water for one year, and until new rates are established. The Board of Supervisors, or the proper city or town authorities, may prescribe other proper rules relating to the delivery of water, not inconsistent with the laws of this State.

Stats. 1858, 219, Sec. 4.

Right to use  
streets,  
ways, alleys  
and roads.

Sec. 550. Any corporation created under the provisions of this Part, for the purposes named in this Title, subject to the reasonable direction of the Board of Supervisors, or city or town authorities, as to the mode and manner of using such right of way, may use so much of the streets, ways and alleys in any town, city or county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city or county, or through or into any part or parts thereof.

Stats. 1868, 220, Sec. 5.

To build and  
keep bridges  
in repair.

Sec. 551. Every canal corporation must construct and keep in good repair at all times, for public use, across their canal, flume or water pipe, all of the bridges that the Board of Supervisors of the county in which such canal is situated may require, the bridges being on the lines of public highways and necessary for public uses in connection with such highways; and all water works must be so laid and constructed as not to obstruct public highways.

Stats. 1862, 541, Sec. 4.

## TITLE IX.

## HOMESTEAD CORPORATIONS.

**SECTION 557.** Time of corporate existence.

558. By-laws must specify time for and amount of payment of instalments, and penalty for failure to pay. By-laws to be furnished to any member on demand.

559. Advertisement and sale of delinquent and forfeited shares.

560. May borrow and loan funds—how, and for what time.

561. Minor children, wards and married women may own stock.

562. Forfeiture for speculating in or owning lands exceeding two hundred thousand dollars.

563. When corporation is terminated, and how.

564. Payment of premiums.

565. Annual report to be published.

**SEC. 557.** Corporations organized for the purpose of acquiring lands in large tracts, paying off encumbrances thereon, improving and subdividing the same into homestead lots or parcels, and distributing them among the shareholders, and for the accumulation of a fund for such purposes, are known as homestead corporations, and must not have a corporate existence for a longer period than ten years.

Time of corporate existence.

Stats. 1861, 567, Secs. 1, 3; 1867-8, 539, Sec. 1.

**SEC. 558.** Such corporations must specify in their by-laws the times when the instalments of the capital stock are payable, the amount thereof, and the fines, penalties or forfeitures incurred in case of default, and a printed copy of the articles of incorporation and by-laws shall be furnished to any shareholder on demand.

By-laws must specify time for and amount of payment of instalments, and penalty for failure to pay. By-laws to be furnished to any member on demand. Advertisement and sale of delinquent and forfeited shares.

**SEC. 559.** Whenever any shares of stock are declared forfeited by resolution of the Board of Directors, the Directors may advertise the same for sale, giving the name of the subscriber and the number of shares, by notice of not less than three weeks, published at least once a week, in a newspaper of general circulation in the city, town or county where the office or principal place of business of such corporation is located, or in case no newspaper is published there, then in the newspaper published nearest to the place where the place of business is. Such

sale must be made at auction, under the direction of the Secretary of the company. The corporation may be a bidder, and the shares must be disposed of to the highest bidder, for cash. No defect, informality or irregularity in the proceedings respecting the sale invalidates it, if notice is given as herein provided. After the sale is made the Secretary must, on receipt of the purchase money, transfer to the purchaser the shares sold, and after deducting from the proceeds of such sale all instalments then due and all expenses and charges of sale, must hold the residue subject to the order of the delinquent subscriber.

Stats. 1863-4, 492; 1867-8, 540, Sec. 1.

May borrow  
and loan  
funds—how,  
and for what  
time.

**Sec. 560.** Homestead corporations may borrow money for the purposes of the corporation, not exceeding at any one time one-fourth of the aggregate amount of the shares or parts of shares and the income thereof; no greater rate of interest must be paid therefor than twelve per cent. per annum. For the purpose of completing the purchase of lands intended to be divided and distributed, they may borrow on the surety of the unsold shares, on the land thus purchased, or that owned by the corporation at the time of procuring the loan, any sum of money which, together with the interest contracted to become due thereon, will not exceed ninety per cent. of the unpaid amount subscribed by the stockholders; but no loan must be made to the corporation, payment whereof is to be made after the expiration of the term of existence specified in the articles of incorporation.

Stats. 1870, 474, Sec. 1; 1861, 567, Sec. 5.

**NOTE.**—There can be no good reason assigned for having a surplus of cash on hand by a homestead corporation; much less can there be for loaning it to its own members, hence we have omitted Sec. 18 of the Act of 1861.

Minor children, wards and married women may own stock.

**Sec. 561.** Such shares of stock in homestead corporations as may be acquired by, and on which the deposits and assessments are paid from the personal earnings of, children, or with gifts to them other than those from their male parents, may be taken and held for them by their parents or guardians. Married women may hold such shares as they acquire similarly, with the personal earnings of themselves or their children, voluntarily be-

stowed therefor, or from property bequeathed or given to them by persons other than their husbands.

Stats. 1861, 567, Sec. 6.

**Sec. 562.** Homestead corporations must not purchase and sell, or otherwise acquire and dispose of real property or any interest therein, or any personal property, for the sole purpose of speculation or profit. Nor must any such corporation at any one time own or hold, in trust or otherwise, for its purposes, real property, or any interest therein, which in the aggregate exceeds in cash value the sum of two hundred thousand dollars. For any violation of the provisions of this section corporations forfeit their corporate rights and powers. On the application of any citizen to a Court of competent jurisdiction such forfeiture may be adjudged, and the judgment carries with it costs of the proceedings.

[New section.]

**Sec. 563.** Every homestead corporation must terminate at the expiration of the time fixed for its existence in the articles of incorporation, or when dissolved as provided in this Part, except for the purpose of winding up and settling its affairs. No dividends of funds must be had on termination of its corporate existence until its debts and liabilities are paid; and upon the final settlement of the affairs of the corporation, or upon the termination of its corporate existence, the Directors, in such manner as they may determine, must divide its property among its shareholders in proportion to their respective interests, or, upon the application of a majority in interest of the stockholders, must sell and dispose of any or all of the real estate of the corporation upon such terms as may be most conducive to the interests of all the stockholders, and must convey the same to the purchaser and distribute the proceeds among the shareholders, or may at any time, when best for the interests of all the shareholders, cause the lands of the corporation to be subdivided into lots and distributed, by sale for premiums, at auction or otherwise, among the shareholders.

Stats. 1861, 567, Sec. 7; 1870, 474, Sec. 1.

**Sec. 564.** The Directors may demand payment of the premiums on lots at the time they are bid off, and if not

Forfeiture for speculating in or owning lands exceeding two hundred thousand dollars.

When corporation is terminated, and how.

Payment of premiums.

so paid on any lot of land, may immediately offer the same for sale again. If any shareholder fails to pay the amount bid by him on any lot or lots of land, on the day the same is made due and payable, the Directors may advertise and sell the shares of stock representing the lots of land on which the premiums remain unpaid, in the manner provided in the by-laws for the sale of shares on account of delinquent instalments and premiums.

Stats. 1870, 474, Sec. 1.

Annual report to be published.

SEC. 565. The actual financial condition of all homestead corporations must, by the Directors thereof, be published annually in the newspaper published nearest the principal place of business of the corporation, for four weeks, if in a weekly, and two weeks, if in a daily. The statement to be made up to the end of the fiscal year, and verified by the oath of the President and Secretary, showing the items of property and liabilities.

Stats. 1861, 567, Sec. 8.

NOTE.—We are indebted to H. B. Congdon, Esq., Secretary of the Land and Building Association, for many valuable suggestions and amendments to the above Title.

## TITLE X.

### SAVINGS AND LOAN CORPORATIONS.

SECTION 571. May loan money—on what terms, how and to whom, and how long.

572. Capital stock, and rights and privileges thereof.

573. No dividends, except from surplus profits. To contract no liability, except for deposits.

574. Property which may be owned by corporations, and how disposed of. Restrictions in purchases as provided above.

575. Married women and minors may own stock in their own right.

576. May issue transferable certificates of deposit. Special certificates.

577. To provide Reserve Fund for the payment of losses.

578. Prohibition on Director and officer, and what vacates office.

May loan money—on what terms, how and to whom, and how long.

SEC. 571. Corporations organized for the purpose of accumulating and loaning the funds of their members, stockholders and depositors, may loan and invest the funds thereof, receive deposits of money, loan, invest and



collect the same, with interest, and may repay depositors with or without interest. No such corporation must loan money except on adequate security on real or personal property, unless such corporation has a paid up capital stock or Reserve Fund of not less than three hundred thousand dollars, and such loan is authorized by the articles of incorporation or by-laws, to be made by a two-third vote of the Directors; such loans must not be for a longer period than six years.

Stats. 1862, 199, Secs. 4, 5; 1864, 158, Sec. 2.

**NORM.**—It has been suggested that all after the word “property,” in the eighth line, should be stricken out, and there is force in the suggestion; but it is the law, and is retained and the suggestion submitted.

**SEC. 572.** When savings and loan corporations have a capital stock specified in their articles of incorporation, certificates of the ownership of shares may be issued; and the rights and privileges to be accorded to, and the obligations to be imposed upon, such capital stock, as distinct from those of depositors, must be fixed and defined, either in the articles of incorporation or in the by-laws.

Capital stock and rights and privileges thereof

Stats. 1862, 203, Sec. 17.

**SEC. 573.** The Directors of savings and loan corporations may, at such times and in such manner as the by-laws prescribe, declare and pay dividends of so much of the profits of the corporation, and of the interest arising from the capital stock and deposits, as may be appropriated for that purpose under the by-laws or under their agreements with depositors. The Directors must not contract any debt or liability against the corporation for any purpose whatever, except for deposits. The capital stock and the assets of the corporation are a security to depositors and stockholders, depositors having the priority of security over the stockholders, but the by-laws may provide that the same security shall extend to deposits made by stockholders.

No dividends, except from surplus profits.

To contract no liability, except for deposits.

Stats. 1870, 130, Sec. 1; 1862, 199, Sec. 10; 1862, 199, Sec. 22.

**NORM.**—It has been suggested that depositors and stockholders should be placed by the law on the same footing. We think there is wisdom in the distinction. A corporation which gives outside depositors a priority of security is enti-

tioned to priority of confidence. All, however, may, if they choose, by their by-laws, obliterate this distinction. We think it well to allow the corporation to invite this superior confidence, or not, as they choose.

Property  
which may  
be owned by  
corpora-  
tions, and  
how disposed  
of.

**SEC. 574.** Savings and loan corporations may purchase, hold and convey real and personal property, as follows :

1. The lot and building in which the business of the corporation is carried on, the cost of which must not exceed one hundred thousand dollars; except, on a vote of two-thirds of the stockholders, the corporation may increase the sum to an amount not exceeding two hundred and fifty thousand dollars.

2. Such as may have been mortgaged, pledged or conveyed to it in trust, for its benefit, in good faith, for money loaned in pursuance of the regular business of the corporation.

3. Such as may have been purchased at sales under pledges, mortgages or deeds of trust made for its benefit, or upon judgments or decrees obtained or rendered for money so loaned.

Restrictions  
in purchases  
as provided  
above.

4. No such corporation must purchase, hold or convey real estate in any other case or for any other purpose ; and all real estate described in Subds. 2 and 3 of this section must be sold by the corporation within five years after the title thereto is vested in it by purchase or otherwise.

5. No corporation must purchase, own or sell personal property, except such as may be requisite for its immediate accommodation for the convenient transaction of its business, mortgages on real estate, bonds, securities or evidences of indebtedness, public or private, gold and silver bullion, and United States mint certificates of ascertained value, and evidences of debt issued by the United States.

6. No corporation must purchase, hold or convey bonds, securities or evidences of indebtedness, public or private, except bonds of the United States, of the State of California and of the counties, cities, or cities and counties, or towns of the State of California, unless such corporation has a capital stock or reserved fund, or both capital stock and reserved fund, paid in, of not less than three hundred thousand dollars.

Stats. 1862, 199, Sec. 13; 1864, 158, Sec. 3; 1865-6, 626;  
Sec. 1.

**Sec. 575.** Married women and minors may, in their own right, make and draw deposits, and draw dividends, and give valid receipts therefor.

Married women and minors may own stock in their own right.

Stats. 1862, 199, Secs. 14, 15; 1864, 158, Sec. 4; 1870, 132, Secs. 2, 3.

**NOTE.**—This provision is in "Domestic Relations" also.

**Sec. 576.** Savings and loan corporations may issue general certificates of deposit, which are transferable, as in other cases, by indorsement and delivery; may issue, when requested by the depositor, special certificates, acknowledging the deposit by the person therein named of a specified sum of money, and expressly providing on the face of such certificate that the sum so deposited and therein named may be transferred only on the books of the corporation. Payment thereafter made by the corporation to the depositor named in such certificate, or to his assignee named upon the books of the corporation, or, in case of death, to the legal representative of such person, of the sum for which such special certificate was issued, discharges the corporation from all further liability on account of the money so paid.

May issue transferable certificates of deposit. Special certificates.

Stats. 1867-8, 459, Sec. 1.

**Sec. 577.** Savings and loan corporations may prescribe by their by-laws the time and conditions on which repayment is to be made to depositors, but whenever there is any call by depositors for repayment of a greater amount than the corporation may have disposable for that purpose, the Directors or officers thereof must not make any new loans or investments of the funds of the depositors, or of the earnings thereof, until such excess of call has ceased. The Directors of any such corporation having no capital stock must retain, on each dividend day, at least five per cent of the net profits of the corporation, to constitute a Reserve Fund, which must be invested in the same manner as other funds of the corporation, and must be used toward paying any losses which the corporation may sustain in pursuing its lawful business. The corporation may provide by its by-laws for the disposal of any excess in the Reserve Fund over one hundred thousand dollars, and the final disposal, upon the disso-

To provide Reserve Fund for the payment of losses.

lution of the corporation, of the Reserve Fund, or of the remainder thereof, after payment of losses.

Stats. 1862, 201, Sec. 11.

**NOTE.**—The Act of March 31st, 1870 (Stats. 1870, 523), and the Act of April 4th, 1870 (Stats. 1870, 822), are omitted. The corporations intended to be provided for therein can be formed under the law as here proposed, and thus the revised laws will be relieved from the embarrassments and complications which so many special provisions have induced.

Prohibition  
on Director  
and officer,  
and what  
vacates office

**SEC. 578.** No Director or officer of any savings and loan corporation must, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such corporation, nor must he become an indorser or surety for loans to others, nor in any manner be an obligor for moneys borrowed of or loaned by such corporation. The office of any Director or officer who acts in contravention of the provisions of this section immediately thereupon becomes vacant.

[New section.]

**NOTE.**—The last section is a suggestion from James De Fremery, of the San Francisco Savings Union, indorsed by Alexander Campbell, attorney at law, San Francisco. We are of the opinion that its adoption will meet with very general disfavor from the conductors of savings banks, but hope in this we may be agreeably disappointed. There is doubtless a class of persons engaged in the conduct of the business of such banks who would be glad to be protected against applications for personal favor. Law makers should be governed by a desire to give the greatest possible security to depositors, as a paramount object. Banks of savings are almost indispensable, and as far as possible they should prove to be what their name imports, and provide ample security for all deposits. It is with this view alone that we have added the amendment, and recommend its adoption, thereby placing beyond the officers even an inducement to lessen the security of innocent and oftentimes ignorant depositors.

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## TITLE XI.

### MINING CORPORATIONS.

**SECTION 584.** Removal of the principal office provided for.

**585.** Directors to file certificates of proceedings in offices of County Clerks and Secretary of State.

**586.** Transfer agencies.

**587.** Stock issued at transfer agencies.

**SEC. 584.** Every mining corporation may change its office or principal place of business from one county or city to another, within this State. Before such removal is made, the consent in writing of the holders of two-thirds of the capital stock must be obtained and filed in the office of the corporation. When such consent is obtained, notice of the intended removal must be published for thirty days, in some newspaper published at or nearest the principal place of business of the corporation, giving the name of the county or city where the office is then situate, and that to which it is intended to remove it.

Removal of the principal office provided for.

Stats. 1863-4, 76, Sec. 1.

**SEC. 585.** When the publication provided for in the preceding section has been completed, the Directors of the corporation must file in the offices of the Clerks of the counties from and to which such change has been made, and in the office of the Secretary of State, certified copies of the written consent of the stockholders to such change and of the notice of such change, and proof of publication; also, a certificate that the proposed removal has taken place; and thereafter the principal place of business of the corporation is at the place removed to.

Directors to file certificates of proceedings in offices of County Clerks and Secretary of State.

Stats. 1863-4, 76, Sec. 2.

**SEC. 586.** Any corporation organized in this State for the purpose of mining or carrying on mining operations in or without this State, may establish and maintain agencies in other States of the United States, for the transfer and issuing of their stock; and a transfer or issue of the same at any such transfer agency, in accordance with the provisions thereof, is valid and binding, as fully and effectually for all purposes as if made upon the books of such corporation at its principal office within this State. The agencies must be governed by the by-laws and the Directors of the corporation.

Transfer agencies.

Stats. 1863-4, 429, Secs. 1, 3.

**SEC. 587.** All stock of any such corporation, issued at a transfer agency, must be signed by the President and Secretary of the corporation, and countersigned at the time of its issue by the agent having charge of the transfer agency. No stock must be issued at a transfer agency

Stock issued at transfer agencies.

unless the certificate of stock, in lieu of which the same is issued, is at the time surrendered for cancellation.

Stats. 1863-4, 429, Sec. 2.

## TITLE XII.

### RELIGIOUS, SOCIAL AND BENEVOLENT CORPORATIONS.

**SECTION 593.** Corporations for purposes other than profit, how formed.

594. Additional facts articles of incorporation to set out.

595. Corporation to hold property, and amount of real estate limited.

596. How much land Masons, Odd Fellows and Pioneers may hold.

597. Directors to make verified report annually.

598. Corporations to forfeit franchise and lands. Attorney-General to sue therefor.

599. Corporations may, by order of the District Court, sell or mortgage real estate, when. Petition. Summons or notice. Objections or answer. Trial, order or decree. Court may direct appraisal of property and disposition of proceeds.

600. What may be provided for in their by-laws, etc.

601. Members admitted after incorporation.

602. No member to transfer membership, etc.

Corporations for purposes other than profit, how formed.

**Sec. 593.** Any number of persons associated together for religious, social, benevolent or other purpose included in the subdivisions of Sec. 286, where pecuniary profit is not their object, may, in accordance with the rules, regulations or discipline of such association, elect for the first year Directors from among their members, the number thereof to be not less than five nor more than eleven, and may incorporate themselves as provided in this Part.

Stats. 1870, 46; 402, Sec. 1.

Additional facts articles of incorporation to set out.

**Sec. 594.** In addition to the requirements of Sec. 290, the articles of incorporation of any association mentioned in the preceding section must set forth the holding of the election for Directors, the time and place where the same was held, that a majority of the members of such association were present and voted at such election, and the result thereof; which facts must be verified by the officers conducting the election.

Stats. 1850, 347, Sec. 176; 1862, 125.

**Sec. 595.** All such corporations may hold all the property of the association owned prior to incorporation or acquired thereafter in any manner, and transact all business relative thereto; but no such corporation must own or hold more real estate than may be necessary whereon to erect buildings for the use of the association in conducting the business and objects thereof, for the convenient use of such buildings and providing burial grounds for the deceased members of such association—not to exceed six whole lots in any city or town nor more than twenty acres in the country; the annual increase or income whereof must not exceed fifty thousand dollars.

Corporation to hold property, and amount of real estate limited.

[New section.]      Stats. 1850, 347, Sec. 182; 1862, 125.

**Sec. 596.** In addition to that provided for in the preceding section, Masons, Odd Fellows and Pioneer incorporated associations may hold such real estate as may be necessary to carry out their charitable purposes, or for the establishment and endowment of institutions of learning connected therewith. In case any such corporation is the owner, by donation or purchase, of more lands than herein or in the preceding section provided for, such surplus must be sold and conveyed by the corporation within five years after its acquisition. Such sale may be made without the order or decree of the District Court as hereinafter provided.

How much land Masons, Odd Fellows and Pioneers may hold.

Stats. 1862, 125; 1863, 34, 624.

**Sec. 597.** The Directors must annually make a full report of all property, real and personal, held in trust for their corporation by them, and of the condition thereof, to the members of the association for which they are acting; which report must be sworn to by the President and Secretary, and certified copies thereof filed in the offices where their original articles of incorporation are filed, accompanied by an affidavit that the corporation has not been engaged in any business or object other than that set forth in their original articles of incorporation.

Directors to make verified report annually.

Stats. 1850, 374, Sec. 183.

**Sec. 598.** Every corporation disobeying the provisions of the three preceding sections, forfeits its franchise, and all the lands held contrary to the provisions thereof be-

Corporations to forfeit franchise and lands.

Attorney-  
General to  
sue therefor.

come the property of the State. Whenever information is given to him, by any citizen of this State, that a corporation has violated any of the provisions of the three preceding sections, the Attorney-General must institute proceedings, in the proper District Court, for the forfeiture of the franchise and the recovery of such lands for the use of the State.

[New section.]

Corporations  
may, by  
order of the  
District  
Court, sell  
or mortgage  
real estate,  
when.

SEC. 599. Corporations organized by members of associations mentioned in Sec. 593 may mortgage or sell the necessary real estate held by them, on complying with the following provisions:

1. The Directors must, by order, declare such disposition of the real estate necessary, or for the best interests of the corporation, in the prosecution of the purposes of the association, setting forth the grounds for the same.

Petition.

2. The Directors must petition the District Court of the county in which the real estate is situate, for the sale thereof, setting forth the order and the grounds upon which the same is asked.

Summons or  
notice.

3. The Judge of the Court, if it appear *prima facie* a case wherein such order should be made, must direct publication of summons to all persons interested in the property to appear before the Court and show cause why such order or decree should not be made. The notice must be published in a weekly newspaper published in the city or county where the property is situate, for one month at least; the last publication thereof to be at least ten days prior to the day set for the hearing of the petition; in lieu of the publication, personal notice may be served on all persons interested in the real estate. In either case, proof of publication or service to be satisfactorily shown as in other cases in the District Court.

Objections  
or answer.

4. At any time before the day set for hearing the petition, any person interested in the property may present objections or answer to the petition, raising either question of law or fact, and the same must be tried by the Court as other cases are tried.

Trial, order  
or decree.

5. If, on the hearing at the trial, it is found by the Court that the mortgage or sale of the property is unnecessary, or that the purposes of the association will not be subserved, advanced or benefited thereby, the order and



decree must be denied; if it be found necessary, or that the purpose of the association will be subserved, advanced or benefited thereby, the petition must be granted.

6. The Court may, if considered necessary, direct an appraisement of the property to be first made, and appoint disinterested appraisers therefor, fix their compensation and time for report; and direct the making and execution of the mortgage or deed and all necessary accompanying notes, bonds or contracts, and to what purpose the proceeds must, by the corporation, be applied, as best comports with the object of the association.

Court may direct appraisement of property and disposition of proceeds.

Stats. 1850, 347, Sec. 179; 1859, 87, Sec. 1.

Sec. 600. Corporations organized for purposes other than for profit may, in their by-laws, ordinances, constitutions or articles of incorporation, make the following provisions, in addition to those provided for in Tit. I of this Part.

What may be provided for in their by-laws, etc.

1. Qualifications of, mode of election and terms of admission to, membership.

2. Fix the fees of admission and dues to be paid to their treasury by members.

3. Provide for the expulsion and suspension of members for misconduct or non-payment of dues; also, for restoration to membership.

4. Such other regulations, not repugnant to the Constitution or laws of the State, as are consonant with the objects of the corporation.

Stats. 1863, 624, Secs. 8, 9.

Sec. 601. Members admitted after incorporation have all the rights and privileges, and are subject to the same responsibilities, as members of the association prior thereto.

Members admitted after incorporation.

Stats. 1863, 624, Sec. 7.

Sec. 602. No member or his legal representative must dispose of or transfer any right or privilege conferred on him by reason of his membership of such corporation, or be deprived thereof, except as herein provided.

No member to transfer membership, etc.

[New section.]

## TITLE XIII.

## CEMETERY CORPORATIONS.

SECTION 608. How much land may be held, and how disposed of.

609. Who are members eligible to vote and hold office.

610. May hold personal property, to what amount. How disposed of.

611. May issue bonds to pay for grounds. Proceeds of sales, how disposed of.

612. May take and hold property or use income thereof, how.

613. Interments in lot, and effect thereof. Transfer of rights only made, how.

614. Lot owners previous to purchase, to be members of the corporation.

How much  
land may be  
held, and  
how disposed  
of.

SEC. 608. Corporations organized to acquire lands for and to maintain cemeteries may take, by purchase, donation or devise, not exceeding three hundred and twenty acres of land, in the county wherein their articles of incorporation are filed, to be held and occupied exclusively for a cemetery for the burial of the dead; which must be surveyed and subdivided into lots or plats, avenues and walks, under order of the Directors, and a map thereof filed in the office of the Recorder of the county wherein the lands are situate; thereafter, upon such terms and subject to such conditions and restrictions, to be inserted in the conveyances, as the by-laws or Directors may prescribe, the Directors may sell and convey the lots or plats to purchasers. All conveyances to be executed under the seal of the corporation, signed by the President and Secretary.

Stats. 1859, 281, Sec. 4.

Who are  
members  
eligible to  
vote and  
hold office.

SEC. 609. Every person of full age who is proprietor of a lot or plat in the cemetery of the corporation, containing not less than two hundred square feet of land, or, if there be more than one proprietor of any such lot, then such of the proprietors as the majority of joint proprietors designate, may, in person or by proxy, cast one vote at all elections had by the corporation for Directors or any other purpose, and is eligible to any office of the corporation. At each annual meeting or election, the Directors must make a report to the proprietors of al

their doings, management and condition of the property and concerns of the corporation.

Stats. 1859, 281, Sec. 5.

**SEC. 610.** Such corporations may hold personal property to an amount not exceeding five thousand dollars, in addition to the surplus remaining from the sales of lots or plats after payments of all bonds issued for the purchase of cemetery lands and interest thereon. Such surplus must be disposed of in the following manner :

May hold personal property, to what amount

1. In the improvement, embellishment and preservation of the cemetery, and paying incidental expenses of the corporation.

How disposed of.

2. By relieving the distressed members of the corporation and others, and for other charitable purposes.

3. By donating it to any board of relief established by such corporations.

Stats. 1859, 281, Sec. 4 ; 1864, 12, Sec. 1.

**SEC. 611.** Such corporations may issue the bonds thereof, bearing interest not exceeding twelve per cent. per annum, for the purchase of lands for their cemeteries, to the payment of which at least sixty per cent. of the proceeds of sales of lots and plats, or other proceeds of the corporation, must be applied every three months, until the bonds and interest thereon are fully paid, the residue or surplus of such proceeds to be used and disposed of as provided in the preceding section.

May issue bonds to pay for grounds.

Proceeds of sales, how disposed of.

Stats. 1859, 281, Sec. 7 ; 1864, 12, Sec. 1.

**SEC. 612.** Cemetery corporations may take and hold any property, or use the income thereof, bequeathed, donated or given in trust to them for the specific purpose of embellishing or improving the grounds, avenues or superstructures of their cemeteries, or for the erection, preservation or repair of monuments therein, or for any other purpose or design consistent with the objects of the corporation.

May take and hold property or use income thereof, how.

Stats. 1859, 281, Sec. 9.

**SEC. 613.** Whenever an interment is made in any lot or plat transferred to individual owners by the corporation, the same thereby becomes forever inalienable, and descends in regular line of succession to the heirs at law

Interments in lot, and effect thereof

Transfer of  
right only  
made, how.

of the owner. When there are several owners of interests in such lot or plat, one or more may acquire by purchase the interest of others interested in the fee simple title thereof; but no one not an owner acquires interest or right of burial therein by purchase; nor must any one be buried in any such lot or plat, not at the time owning an interest therein, or who is not the relative of such owner or of his wife, except by consent of all jointly interested.

Stats. 1859, 281, Sec. 11.

Lot owners  
previous to  
purchase, to  
be members  
of the corpo-  
ration.

SEC. 614. When grounds purchased or otherwise acquired for cemetery purposes has been previously used as a burial ground, those who are lot owners at the time of the purchase are entitled to continue to own the same, and are members of the corporation, with all the privileges a purchase of a lot from the corporation could confer.

Stats. 1859, 281, Sec. 12.

## TITLE XIV.

### AGRICULTURAL FAIR CORPORATIONS.

SECTION 620. May acquire and hold real estate, how much.

621. Shall not contract debts or liabilities exceeding amount in treasury.

622. Not for profit. May fix fee, etc., for membership.

May acquire  
and hold  
real estate,  
how much.

SEC. 620. Agricultural fair corporations may purchase, hold or lease any quantity of land, not exceeding in the aggregate one hundred and sixty acres, with such buildings and improvements as may be erected thereon, and may sell, lease or otherwise dispose of the same, at pleasure. This real estate must be held for the purpose of erecting buildings and other improvements thereon, to promote and encourage agriculture, horticulture, mechanics, manufactures, stock raising and general domestic industry.

Stats. 1859, 104, Sec. 2.

Shall not  
contract  
debts or  
liabilities  
exceeding  
amount in  
treasury.

SEC. 621. Neither the members of the agricultural fair corporation, nor the Directors thereof, shall contract any debts or liabilities in excess of the amount of money in

the treasury at the time such debt or liability is being contracted; but for the purpose of paying for real estate, they may create debts and liabilities not exceeding five thousand dollars, secured by mortgage on the property of the corporation. The parties contracting any debt or liability in excess of that by this section authorized, are personally liable therefor.

Stats. 1859, 104, Sec. 5.

Sec. 622. Agricultural fair corporations are not conducted for profit, and have no capital stock or income other than that derived from charges to exhibitors and fees for membership, which charges, together with the term of membership and mode of acquiring the same, must be provided for in their articles of incorporation or by-laws. Such fees must never be greater than to raise sufficient revenue to discharge the debt for real estate, improvements thereon, and to defray the current expenses of fairs.

Not for profit

May fix fee,  
etc., for  
membership

Stats. 1859, 104, Sec. 4.

## TITLE XV.

### GAS CORPORATIONS.

Section 628. Corporations to obtain privilege from city or town, and use meters proved by the inspector.

629. Gas to be supplied on written application. Damages for refusal.

630. When corporations may refuse to supply gas.

631. Portions of supply pipes to be laid by the corporation and by applicant.

632. Agent of corporation may inspect meters.

633. When persons neglect to pay, gas may be shut off.

Sec. 628. No corporation must supply any city or town with gas, or lay down mains or pipes for that purpose in the streets or alleys thereof, without permission from the city or town authorities. Nor must such corporation furnish or use any gas meter which has not been proved and sealed by the inspector of gas meters.

Corporations  
to obtain  
privilege  
from city or  
town, and  
use meters  
proved by  
the inspector

Stats. 1863, 647, Sec. 3.

Gas to be supplied on written application.

Damages for refusal.

SEC. 629. On written application, and payment of dues for gas from the owner or occupant thereof, every gas corporation must furnish any building or premises prepared with pipes to receive the same, at no greater distance than one hundred feet from a main, all gas required for lighting such building or premises. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas as required, the owner or occupant may recover from the corporation the sum of fifty dollars, and for every day such refusal or neglect continues thereafter, the further sum of five dollars as ascertained damages.

Stats. 1863, 647, Sec. 3.

When corporations may refuse to supply gas.

SEC. 630. Gas corporations are not required to furnish for or affix to buildings or premises pipes and fittings, except on contract, nor must the owner or occupant applying for gas be refused on the ground that a former owner or occupant is in arrears for gas, unless he has agreed with such former owner or occupant to pay the same and refuses or neglects to do so. No corporation is required to lay service pipe where serious obstacles exist to laying it, unless the applicant, if required, deposits in advance with the corporation, a sum of money sufficient to pay the cost of laying the pipes and fittings and fixtures for using gas on the premises and in the building to be supplied.

Stats. 1863, 647, Sec. 5.

Portions of supply pipes to be laid by the corporation and by applicant.

SEC. 631. All gas corporations must lay supply pipes connecting any building or premises with the main, for a distance of one hundred feet, if so far distant, at the expense of the corporation. The applicant for gas must lay the pipe from the end of the one hundred feet to such portions of the buildings or premises as desired, at his own expense.

[New section.]

Agent of corporation may inspect meters.

SEC. 632. Any agent of a gas corporation exhibiting written authority, signed by the President or Secretary thereof for such purpose, may enter any building or premises lighted with gas supplied by such corporation to inspect the gas meters therein, to ascertain the quantity of gas supplied or consumed. Every owner or occu-

part of such buildings who hinders or prevents such entry or inspection must pay to the corporation the sum of fifty dollars as ascertained damages.

Stats. 1863, 647, Sec. 6.

Sec. 633. All gas corporations may shut off the supply of gas from any person who neglects or refuses to pay for the gas supplied, or the rent for any meter, pipes or fittings provided by the corporation as required by his contract; and for the purpose of shutting off the gas in such case, any employé of the corporation may enter the building or premises of such person, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of any day, and remove therefrom any property of the corporation used in supplying gas.

When persons neglect to pay, gas may be shut off.

Stats. 1863, 647, Sec. 7.

## TITLE XVI.

### LAND AND BUILDING CORPORATIONS.

Section 639. How organized.

640. May borrow money.

641. Powers and object of the corporation.

642. May insure the lives of members and debtors.

643. What real estate may be owned at any one time.

644. What the by-laws may provide.

645. Secretary must make annual statement, and publish same.

646. Liability of shareholders for debts.

647. Consolidation and transfer of corporation business and property.

648. Married women and minors.

Sec. 639. Corporations organized under Subd. 11 of Sec. 286, may raise funds in shares not exceeding two hundred dollars each, payable in periodical instalments, to enable any member to receive therefrom an advance of his shares, upon security by mortgage or other conveyance of real estate. Such bodies are known as land and building corporations, and may be organized with or without a capital stock.

How organized.

Stats. 1861, 567, Sec. 1.

Sec. 640. Any such corporation may borrow money for the purpose of carrying out its objects, and may give

May borrow money.

as security therefor its shares or mortgage upon its real estate.

Stats. 1861, 567, Sec. 5; 1869-70, 474, Sec. 1.

Powers and  
object of the  
corporation.

Sec. 641. Any such corporation may purchase real estate and erect buildings for its members, and make loans or advances to its members for the purpose of aiding them in acquiring real estate, making improvements thereon and removing encumbrances therefrom; such corporation to be secured therefor in manner provided in the preceding section, until the amount or value of the shares so loaned or advanced are fully repaid to such corporation, with the interest thereon, and all fines or other payments incurred in respect thereof.

Stats. 1861, 567, Secs. 5-18.

May insure  
the lives of  
members  
and debtors.

Sec. 642. Such corporation may insure, in some life insurance company incorporated under the laws of this State, the lives of its members and debtors, for the benefit of the corporation and of the families or legal representatives of such decedent shareholders.

[New section.]

What real  
estate may  
be owned at  
any one time

Sec. 643. Any such corporation may purchase, hold and convey real estate, as follows:

1. The lot and building in which the business of the corporation is carried on, the cost of which must not exceed one hundred thousand dollars.

2. Such as may from time to time be necessary to supply the wants of its members, the cost of which, held unallotted to the members thereof at any one time, must not exceed the sum of one hundred thousand dollars.

3. Such as shall have been mortgaged, pledged or conveyed to it in trust, for its benefit, for money advanced, or to secure the purchase price thereof in pursuance of the regular business of the corporation.

Stats. 1862, 199; "Savings and Loan Corporations," Sec. 184.

What the  
by-laws may  
provide.

Sec. 644. The by-laws of such corporations must specify the amount of the periodical subscriptions or payments to be made by each member to the funds thereof; the time and manner in which such payments are to be made; the fines and forfeiture for default; the time and manner of election of Directors and other officers, and



their terms of office; the manner in which the real estate may be distributed, allotted or sold to its members; the terms and conditions upon which advances may be made to its members and by them repaid to the corporation; the manner in which a person may become and cease to be a member; the conditions on which members may withdraw from the corporation, and provide for the payment to withdrawing members of the sums of money due to them arising from subscriptions or payments to the funds thereof, and the proportion of profits such withdrawing members may receive on withdrawal; but no member can withdraw from the corporation within twelve months from the date of becoming a member.

Stats. 1861, 567, Sec. 2; 1861, 567, Sec. 19; 1867-8, 539, Sec. 1.

**SEC. 645.** The Secretary of any such corporation must, once in each year during the existence of the corporation, prepare a full and explicit statement of the financial affairs thereof, comprising a balance sheet, statements of receipts and expenditures, profit and loss, and assets and liabilities, which must be audited and verified by two competent persons (not Directors), elected by the general body of shareholders, and be countersigned by the President and Secretary. A copy of such statement must be printed and circulated among the members, and published for one week immediately after the annual general meeting of the corporation, in one or more newspapers published daily, or four weeks in one or more newspapers published weekly, in the town or city where the principal office is located.

Secretary must make annual statement, and publish same.

Stats. 1861, 567, Sec. 9.

**SEC. 646.** Every present and past member of such corporation is personally liable for such proportion of all its debts and liabilities as the number of shares subscribed by him bears to the whole number of subscribed shares; but no past member is liable for such contribution if more than one year has elapsed since he ceased to be a member before suit is commenced, nor for any debt or liability contracted after the time at which he ceased to be a member, nor unless it appears to the Court that the existing members are unable to satisfy such debts and liabilities; nor must any contribution be required from

Liability of shareholders for debts.

any member or past member, exceeding the amount unpaid on the shares in respect of which he is liable.

Stats. 1861, 567, Sec. 10.

Consolidation and transfer of corporation business and property.

SEC. 647. Any two or more such corporations may unite and become incorporated in one body, with or without any dissolution or division of the funds of such corporation or either of them; or any such corporation may transfer its engagements, funds and property to any other such corporation, upon such terms as may be agreed upon by two-thirds of the members of each of such bodies present at general meetings of the members, convened for the purpose, by notice stating the object of the meeting, sent through the Post-office to every member, and by general notice, published in some daily newspaper at least one week, or weekly newspaper at least two weeks, published at the place where the principal business of the corporations is carried on; but no such transfer shall prejudice any right of any creditor of the corporation transferring.

NOTE.—Copy of a bill pending in the English Parliament.

Married women and minors.

SEC. 648. Married women and minors may be admitted as members and may take and hold shares in such corporations, and may execute all necessary instruments and give all necessary acquittances, and sell and transfer their shares, in like manner as other members.

Stats. 1861, 567, Sec. 6.

NOTE.—The last Title of this Part was prepared and presented to us by Mr. H. B. Congdon, of the San Francisco Co-operative Land and Building Association, after the subject of "Corporations" had been prepared; printed once, and resubmitted with amendments for a final printing. We had not the time to give this particular subject the attention its importance demands, and therefore report it for consideration without recommendation.

#### NOTE.

The latest legislation declaring and defining the objects and purposes for which corporations might be formed, as well as providing for their government, made them subject alone to the few crude provisions of the several Acts, and expressly declared that such corporations should not be subject to the general laws upon the subject. This is calculated to awaken the minds of all to a growing evil alluded to at some length in note to Sec. 286. We give

show the title and first sections of two Acts passed at the session of 1869-70, to show how indeterminate are the objects and purposes for which corporations were authorized to be formed, viz :

*"An Act to provide for the formation of corporations for the accumulation of funds and savings, and the direct promotion of manufacturing and mechanic arts, agriculture and mining.*

"SECTION 1. Corporations for the purpose of aggregating the funds and savings of the members thereof and others, and preserving and investing the same for their common benefit, so as to directly promote the establishment and increase of manufacturing and mechanical industry, mining and agriculture, in the State of California, may be formed according to the provisions of this Act; and such corporations, and the members and stockholders thereof, shall be subject to all the conditions and liabilities herein imposed, and none other." (Stats. 1869-70, 523.)

This Act, having a very indefinite object expressed in its title, seems to have been intended to allow all corporations which may, by possible construction, be included in its title, to *loan money*; and provides a scale of preferences in making their loans. This will be apparent on examining the Act.

*"An Act to provide for the formation of corporations for certain purposes.*

"SECTION 1. Corporations for any trading, manufacturing, mechanical, or other lawful business or purpose, may be formed under the provisions of this Act; such corporations and its members to be subject to the duties, conditions and liabilities herein imposed, and no others." (Stats. 1869-70, 822.)

If the Act of 1853, as amended in 1854, commented on in the case of *Vandall vs. South San Francisco Dock and Wharf Company*, is obnoxious to the objection of the learned Judge rendering the decision, then how much more objectionable are these two Acts. The provisions of these two Acts are not retained further than some of the restrictive features.

Scarcely a section of Part IV is in the exact language of the original. All have been condensed and made to conform to the decisions of the Supreme Court; and when possible, one has been made to perform the office of many. References are complete to all statutes from which sections are drawn, and it will be observed that they are numerous. The main features of our present statutes applicable to special corporations have been retained; some of minor importance are omitted as unnecessary. Tit. I is applicable to all corporations, and contains ample provisions for their organization and government. All special provisions are contained in the succeeding Titles. There are seventy-two pages of Hittell's closely printed work devoted to the subject of corporations; besides, the Statutes of 1865-6, 1867-8 and 1869-70 contain about forty pages more on this subject, all of which are condensed and so refined that, if printed in the same manner, this work would not occupy more than one-third the space.

When reference is made to the page of a statute, giving its date, it is more frequently the one containing the title of the Act; but sometimes it is the page on which the section is found.



## **DIVISION SECOND.**

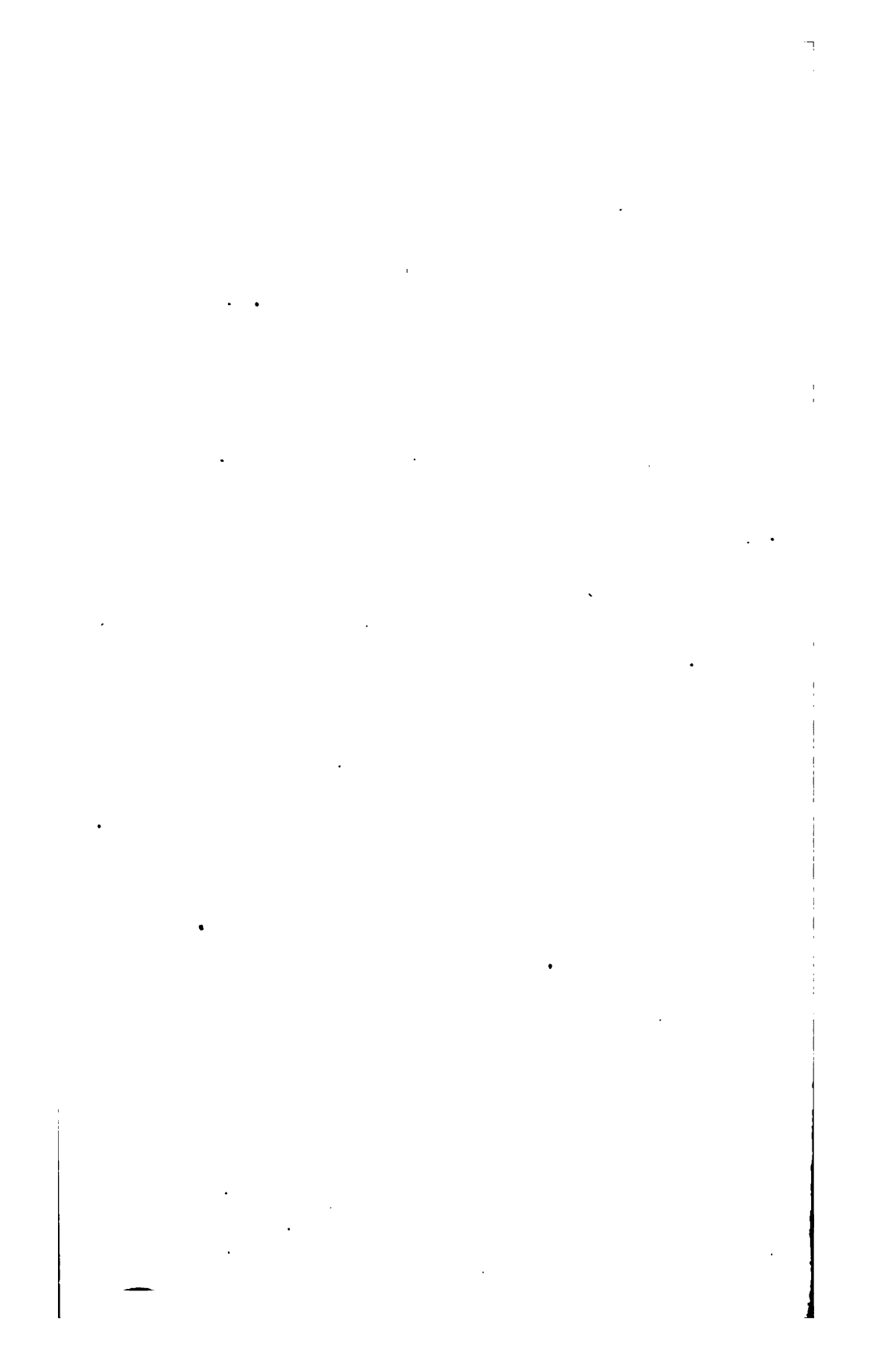
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**PART I. PROPERTY IN GENERAL.**

**II. REAL OR IMMOVABLE PROPERTY.**

**III. PERSONAL OR MOVABLE PROPERTY.**

**IV. ACQUISITION OF PROPERTY.**



# PART I.

## PROPERTY IN GENERAL.

### TITLE I. NATURE OF PROPERTY.

#### II. OWNERSHIP.

#### III. GENERAL DEFINITIONS.

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## TITLE I.

### NATURE OF PROPERTY.

#### SECTION 654. Property, what.

655. In what property may exist.

656. Wild animals.

657. Real and personal.

658. Real property.

659. Land.

660. Fixtures.

661. Appurtenances.

662. Property in mines.

663. Personal property.

SEC. 654. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property. Property,  
what.

N. Y. C. C., Sec. 159.

SEC. 655. There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill, as the composition of an author, the good will of a business, trade marks and signs, and of rights created or granted by statute. In what  
property  
may exist.

N. Y. C. C., Sec. 160.

SEC. 656. Animals wild by nature are the subjects of ownership while living only when on the land of the per- wild  
animals.

son claiming them, or when tamed, or taken and held in possession, or disabled and immediately pursued.

N. Y. C. C., Sec. 161.

Real and  
personal.

SEC. 657. Property is either—

1. Real or immovable; or,
2. Personal or movable.

N. Y. C. C., Sec. 162.

Real  
property.

SEC. 658. Real or immovable property consists of—

1. Land.
2. That which is affixed to land.
3. That which is incidental or appurtenant to land.
4. Mines and mining claims.

N. Y. C. C., Sec. 163.

NOTE.—Subd. 4 is new.

Land.

SEC. 659. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance.

N. Y. C. C., Sec. 164.

Fixtures.

SEC. 660. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of nails, bolts or screws.

N. Y. C. C., Sec. 165.

NOTE.—By California and Nevada decisions this rule has been a little modified, so as to make the question of fixtures depend somewhat upon the intent or purposes of the party in erecting buildings for temporary use. It is thought best, however, to preserve the common law rules in terms as contained in this section.

Appurte-  
nances.

SEC. 661. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water course, or of a passage for light, air or heat from or across the land of another.

N. Y. C. C., Sec. 166.



SEC. 662. Property in mines is real property, whether held by letters patent, transfer, occupancy or under mining rules and customs. Property in mines.

[New section.] Stats. 1860, 175.

SEC. 663. Every kind of property that is not real is personal. Personal property.

N. Y. C. C., Sec. 167.

## TITLE II.

### OWNERSHIP.

#### CHAPTER I. OWNERS.

##### II. MODIFICATIONS OF OWNERSHIP.

##### III. RIGHTS OF OWNERS.

##### IV. TERMINATION OF OWNERSHIP.

### CHAPTER I.

#### OWNERS.

##### SECTION 669. Owner.

670. Property of the State.

671. Who may own property.

672. Aliens inheriting, must claim within five years.

SEC. 669. All property has an owner, whether that owner is the State, and the property public, or the owner an individual, and the property private. The State may also hold property as a private proprietor. Owner.

N. Y. C. C., Sec. 168.

SEC. 670. The State is the owner of all land below high water mark bordering upon tide water; of all land below the water of a lake or stream which constitutes an exterior boundary of the State; of all property lawfully appropriated by it to its own use; of all property dedicated to the State, and of all property of which there is no other owner. Property of the State.

N. Y. C. C., Sec. 169.

Who may  
own prop-  
erty.

SEC. 671. Any person, whether citizen or alien, may take and hold property, real or personal.

N. Y. C. C., Sec. 170; Const., Art. I, Sec. 17; *Ramaratz vs. Kent*, 2 Cal., 558; *Attorney-General vs. Folsom*, 5 Cal., 373; *Sumssen vs. Bofer*, 6 Cal., 250; *Norris vs. Hoyt*, 18 Cal., 217; *Farrell vs. Enright*, 12 Cal., 450; *State of California vs. Rogers*, 13 Cal., 159.

Aliens inheriting,  
must claim  
within five  
years.

SEC. 672. If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in Tit. VIII, Part III, CODE OF CIVIL PROCEDURE.

Stats. 1856, 137; *People vs. Rogers*, 13 Cal., 159.

## CHAPTER II.

### MODIFICATIONS OF OWNERSHIP.

#### ARTICLE I. INTERESTS IN PROPERTY.

##### II. CONDITIONS OF OWNERSHIP.

##### III. RESTRAINTS UPON ALIENATION.

##### IV. ACCUMULATIONS.

#### ARTICLE I.

##### INTERESTS IN PROPERTY.

#### SECTION 678. Ownership, absolute or qualified.

- 679. When absolute.
- 680. When qualified.
- 681. Several ownership, what.
- 682. Ownership of several persons.
- 683. Joint interest, what.
- 684. Partnership interest, what.
- 685. Interest in common, what.
- 686. What interests are in common.
- 687. Community property.
- 688. Interests as to time.
- 689. Present interest, what.
- 690. Future interest, what.
- 691. Perpetual interest, what.
- 692. Limited interest, what.
- 693. Kinds of future interests.
- 694. Vested interests.
- 695. Contingent interests.

- SECTION 696. Two or more future interests.  
 697. Certain future interests not to be void.  
 698. Posthumous children.  
 699. Qualities of expectant estates.  
 700. Same.  
 701. Interests in real property.  
 702. Same.  
 703. What future interests are recognized.

SEC. 678. The ownership of property is either—

1. Absolute; or,
2. Qualified.

Ownership,  
absolute or  
qualified.

N. Y. C. C., Sec. 171.

SEC. 679. The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws.

When  
absolute.

Thus the use of gunpowder is restricted by general laws, but its ownership may nevertheless be justly called absolute.

N. Y. C. C., Sec. 172.

SEC. 680. The ownership of property is qualified—

1. When it is shared with one or more persons.
2. When the time of enjoyment is deferred or limited.
3. When the use is restricted.

When  
qualified.

N. Y. C. C., Sec. 173.

SEC. 681. The ownership of property by a single person is designated as a sole or several ownership.

Several  
ownership,  
what.

N. Y. C. C., Sec. 174.

SEC. 682. The ownership of property by several persons is either—

Ownership  
of several  
persons.

1. Of joint interests.
2. Of partnership interests.
3. Of interests in common.
4. Of community interest of husband and wife.

N. Y. C. C., Sec. 175.

SEC. 683. A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer which confers a right of survivorship.

Joint  
interest,  
what.

This provision is intended to confine the right of survivorship to cases in which its creation was clearly intended.

N. Y. C. C., Sec. 176; Stats. 1855, 171, Sec. 1; Dewey vs. Lambier, 7 Cal., 347; Bowen vs. May, 12 Cal., 351.

Partnership  
interest,  
what.

SEC. 684. A partnership interest is one owned by several persons, in partnership, for partnership purposes.

N. Y. C. C., Sec. 177.

Interest in  
common,  
what.

SEC. 685. An interest in common is one owned by several persons, not in joint ownership or partnership.

N. Y. C. C., Sec. 178.

What  
interests are  
in common.

SEC. 686. Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation, expressly or by necessary implication, to be a joint interest, with a right of survivorship, or unless acquired as community property.

N. Y. C. C., Sec. 179; Stats. 1855, 171, Sec. 1.

Community  
property.

SEC. 687. Community property is property acquired by husband and wife, or either, after marriage, when not acquired as the separate property of either or as common or joint property of both.

[New section.] Civil Code of Louisiana, 370, Art. 237.

**NOTE.**—The community property consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, or the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

Interests as  
to time.

SEC. 688. In respect to the time of enjoyment, an interest in property is either—

1. Present or future; and,
2. Perpetual or limited.

N. Y. C. C., Sec. 180.

Present  
interest,  
what.

SEC. 689. A present interest entitles the owner to the immediate possession of the property.

N. Y. C. C., Sec. 181.

Future  
interest,  
what.

SEC. 690. A future interest entitles the owner to the possession of the property only at a future period.

N. Y. C. C., Sec. 182.

**Sec. 691.** A perpetual interest has a duration equal to that of the property.

Perpetual  
interest,  
what.

N. Y. C. C., Sec. 183.

**Sec. 692.** A limited interest has a duration less than that of the property.

Limited  
interest,  
what.

N. Y. C. C., Sec. 184.

**Sec. 693.** A future interest is either—

1. Vested; or,
2. Contingent.

Kinds of  
future  
interests.

N. Y. C. C., Sec. 185.

**Sec. 694.** A future interest is vested, when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.

Vested  
interests.

N. Y. C. C., Sec. 186.

**Sec. 695.** A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect, remains uncertain.

Contingent  
interests.

N. Y. C. C., Sec. 187.

**Sec. 696.** Two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

Two or more  
future  
interests.

N. Y. C. C., Sec. 188.

**Sec. 697.** A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect.

Certain  
future  
interests not  
to be void.

N. Y. C. C., Sec. 189.

**Sec. 698.** When a future interest is limited to successors, heirs, issue or children, posthumous children are entitled to take in the same manner as if living at the death of their parent.

Posthumous  
children.

N. Y. C. C., Sec. 190; Stats. 1855, 171, Sec. 5.

**Sec. 699.** Future interests pass by succession, will and transfer, in the same manner as present interests.

Qualities of  
expectant  
estates.

N. Y. C. C., Sec. 191.

Same.

**SEC. 700.** A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind.

N. Y. C. C., Sec. 192.

Interests in real property.

**SEC. 701.** In respect to real or immovable property, the interests mentioned in this chapter are denominated estates, and are specially named and classified in Part II of this Division.

N. Y. C. C., Sec. 193.

Same.

**SEC. 702.** The names and classification of interests in real property have only such application to interests in personal property as is in this Division of the Code expressly provided.

N. Y. C. C., Sec. 194.

What future interests are recognized.

**SEC. 703.** No future interest in property is recognized by the law, except such as is defined in this Division of the Code.

N. Y. C. C., Sec. 195.

## ARTICLE II.

### CONDITIONS OF OWNERSHIP.

**SECTION 707.** Fixing the time of enjoyment.

708. Conditions.

709. Certain conditions precedent, void.

710. Conditions restraining marriage, void.

711. Conditions restraining alienation, void.

Fixing the time of enjoyment.

**SEC. 707.** The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case the enjoyment is said to be upon condition.

N. Y. C. C., Sec. 196.

Conditions.

**SEC. 708.** Conditions are precedent or subsequent. The former fix the beginning, the latter the ending of the right.

N. Y. C. C., Sec. 197.

Certain conditions precedent, void.

**SEC. 709.** If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void, and the right cannot exist. If it requires the performance of an act not wrong of itself,

but otherwise unlawful, the instrument takes effect and the condition is void.

N. Y. C. C., Sec. 198.

SEC. 710. Conditions imposing restraints upon marriage, except upon the marriage of a minor, or of the widow of the person by whom the condition is imposed, are void; but this does not affect limitations where the intent was not to forbid marriage but only to give the use until marriage.

Conditions  
restraining  
marriage,  
void.

N. Y. C. C., Sec. 199.

SEC. 711. Conditions restraining alienation, when repugnant to the interest created, are void.

Conditions  
restraining  
alienation,  
void.

N. Y. C. C., Sec. 200.

### ARTICLE III.

#### RESTRAINTS UPON ALIENATION.

SECTION 715. How long it may be suspended.

716. Future interests void, which suspend power of alienation.

717. Leases of agricultural land, for over ten years, void.

718. Leases of city lots, for over twenty years, void.

SEC. 715. The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the limitation or condition, except in the single case mentioned in Sec. 772.

How long it  
may be  
suspended.

N. Y. C. C., Sec. 201.

SEC. 716. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

Future  
interests  
void, which  
suspend  
power of  
alienation.

N. Y. C. C., Sec. 202.

SEC. 717. No lease or grant of agricultural land for a longer period than ten years, in which shall be reserved any rent or service of any kind, shall be valid.

Leases of  
agricultural  
land, for  
over ten  
years, void.

Stats. 1851, 169, Sec. 1; N. Y. C. C., Sec. 203.

Leases of city  
lots, for over  
twenty  
years, void.

SEC. 718. No lease or grant of any town or city lot, for a longer period than twenty years, in which shall be reserved any rent or service of any kind, shall be valid.

Stats. 1851, 169, Sec. 1; N. Y. C. C., Sec. 203.

#### ARTICLE IV.

##### ACCUMULATIONS.

SECTION 722. Dispositions of income.

723. Accumulations, when void.

724. Accumulation of income.

725. Other directions, when void in part.

726. Application of income to support, etc., of minor.

Dispositions  
of income.

SEC. 722. Dispositions of the income of property to accrue and to be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules prescribed in this Title in relation to future interests.

N. Y. C. C., Sec. 204.

Accumula-  
tions, when  
void.

SEC. 723. All directions for the accumulation of the income of property, except such as are allowed by this Title, are void.

N. Y. C. C., Sec. 205.

Accumula-  
tion of in-  
come.

SEC. 724. An accumulation of the income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing, sufficient to pass the property out of which the fund is to arise, as follows :

1. If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or,

2. If such accumulation is directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, it must commence within the time in this Title permitted for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority.

N. Y. C. C., Sec. 206.

Other direc-  
tions, when  
void in part.

SEC. 725. If, in either of the cases mentioned in the last section, the direction for an accumulation is for a



longer term than during the minority of the beneficiaries, the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority.

N. Y. C. C., Sec. 207.

SEC. 726. When a minor for whose benefit an accumulation has been directed is destitute of other sufficient means of support and education, the proper Court, upon application, may direct a suitable sum to be applied thereto out of the fund.

Application of income to support, etc., of minor.

N. Y. C. C., Sec. 208.

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### CHAPTER III.

#### RIGHTS OF OWNERS.

Section 732. Increase of property.

733. In certain cases who entitled to income of property.

SEC. 732. The owner of a thing owns also all its products and accessions.

Increase of property.

N. Y. C. C., Sec. 209.

SEC. 733. When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership, during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest.

In certain cases who entitled to income of property.

N. Y. C. C., Sec. 210.

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### CHAPTER IV.

#### TERMINATION OF OWNERSHIP.

Section 739. Future interests, when defeated.

740. Same.

741. Future interests, when not defeated.

742. Same.

Future in-  
terests, when  
defeated.

SEC. 739. A future interest, depending on the contingency of the death of any person without successors, heirs, issue or children, is defeated by the birth of a posthumous child of such person, capable of taking by succession.

N. Y. C. C., Sec. 211; Stats. 1855, 171, Sec. 4.

Same.

SEC. 740. A future interest may be defeated in any manner, or by any act or means, which the party creating such interest provided for or authorized in the creation thereof; nor is a future interest, thus liable to be defeated, to be on that ground adjudged void in its creation.

N. Y. C. C., Sec. 212.

Future in-  
terests, when  
not defeated.

SEC. 741. No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger or otherwise, except as provided by the next section, or where a forfeiture is imposed by statute as a penalty for the violation thereof.

N. Y. C. C., Sec. 213.

Same.

SEC. 742. No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period.

N. Y. C. C., Sec. 214.

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## TITLE III.

### GENERAL DEFINITIONS.

SECTION 743. Income, what.

749. Time of creation, what.

Income,  
what.

SEC. 748. The income of property, as the term is used in this Part of the Code, includes the rents and profits of

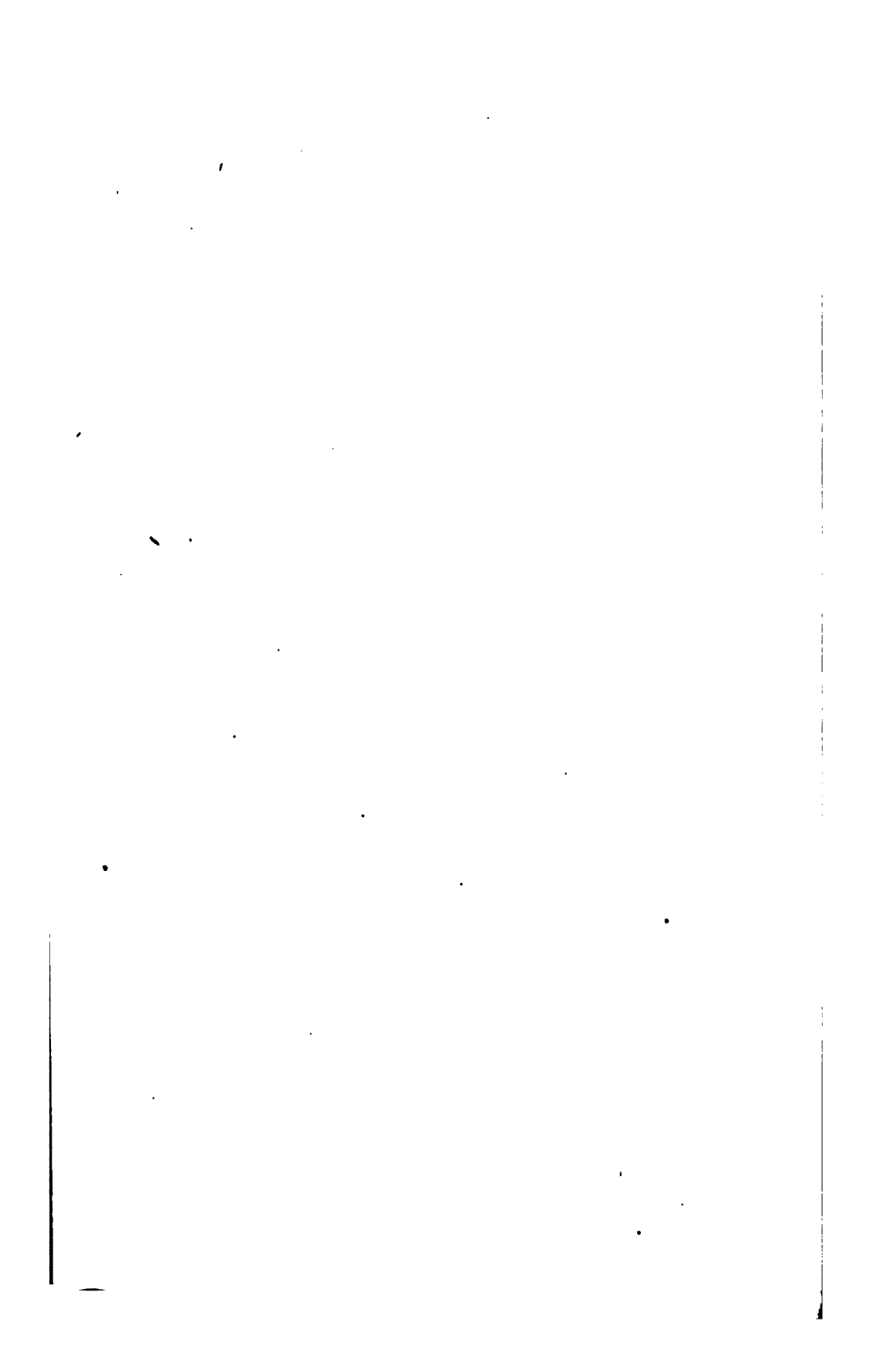
**real property, the interest of money, dividends upon stock and other produce of personal property.**

N. Y. C. C., Sec. 215.

**SEC. 749.** The delivery of the grant, where a limitation, condition or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition or interest, within the meaning of this Part of the Code.

Time of creation, what.

N. Y. C. C., Sec. 216.



## PART II.

### REAL OR IMMOVABLE PROPERTY.

#### TITLE I. GENERAL PROVISIONS.

##### II. ESTATES IN REAL PROPERTY.

##### III. RIGHTS AND OBLIGATIONS OF OWNERS.

##### IV. USES AND TRUSTS.

##### V. POWERS.

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### TITLE I.

#### GENERAL PROVISIONS.

SECTION 755. Real property, how governed.

SEC. 755. Real property within this State is governed by the law of this State.

Real prop-  
erty, how  
governed.

N. Y. C. C., Sec. 217.

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### TITLE II.

#### ESTATES IN REAL PROPERTY.

##### CHAPTER I. ESTATES IN GENERAL.

##### II. TERMINATION OF ESTATES.

##### III. SERVITUDES.

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#### CHAPTER I.

##### ESTATES IN GENERAL.

SECTION 761. Enumeration of estates.

762. What estate a fee simple.

763. Conditional fees and estates tail abolished.

## SECTION 764. Certain remainders valid.

- 765. Freeholds. Chattels real. Chattel interests.
- 766. Estates for life of a third person, when a freehold, etc.
- 767. Future estates, what.
- 768. Reversions.
- 769. Remainders.
- 770. Limitations of chattels real.
- 771. Suspension by trust.
- 772. Contingent remainder in fee.
- 773. Remainders, future and contingent estates, how created.
- 774. Limitation of successive estates for life.
- 775. Remainder upon estates for life of third person.
- 776. Same.
- 777. Contingent remainder on a term of years.
- 778. Remainder of estates for life.
- 779. Remainder upon a contingency.
- 780. Heirs of a tenant for life, when to take as purchasers.
- 781. Construction of certain remainders.
- 782. Effect of power of appointment.

Enumera-  
tion of  
estates.

SEC. 761. Estates in real property, in respect to the duration of their enjoyment, are either—

1. Estates of inheritance or perpetual estates.
2. Estates for life.
3. Estates for years; or,
4. Estates at will.

N. Y. C. C., Sec. 218.

What estate  
a fee simple.

SEC. 762. Every estate of inheritance, notwithstanding the abolition of tenures, continues to be called a fee simple, or fee; and every such estate, when not defeasible or conditional, is called a fee simple absolute, or an absolute fee.

N. Y. C. C., Sec. 219.

Conditional  
fees and  
estates tail  
abolished.

SEC. 763. Conditional fees at Common Law and estates tail under the statute *de donis* are abolished; and every estate which would be adjudged a conditional fee at Common Law, or a fee tail by the statute *de donis*, is a fee simple; and, if no valid remainder is limited thereon, is a fee simple absolute.

N. Y. C. C., Sec. 220.

NOTE.—The words “conditional fees at Common Law” and “fee tail by the statute *de donis*” are substituted for the words “fee tail, according to the law of this State as it existed on the 12th day of July, 1782,” in the New York Civil Code.

It is not certain whether our Act adopting the Common Law included the *conditional fee* at Common Law or its

successor, the fee tail, under the statute *de donis*. The Codes supersede both, and hence both are named as abolished.

**SEC. 764.** Where a remainder in fee is limited upon any estate, which would by the Common Law be adjudged a conditional fee, or fee tail, such remainder is valid as a contingent limitation upon a fee, and vests in possession, on the death of the first taker, without issue living at the time of his death.

Certain remainders valid.

N. Y. C. C., Sec. 221.

**SEC. 765.** Estates of inheritance and for life are called estates of freehold; estates for years are chattels real; and estates at will are chattel interests, but are not liable as such to sale on execution.

Freeholds.  
Chattels real  
Chattel interests.

N. Y. C. C., Sec. 222.

**SEC. 766.** An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold only during the life of the grantee or devisee. After his death it is a chattel real.

Estates for life of a third person, when a freehold, etc.

N. Y. C. C., Sec. 223.

**SEC. 767.** A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time.

Future estates, what

N. Y. C. C., Sec. 224.

**SEC. 768.** A reversion is the residue of an estate left, by operation of law, in the grantor or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

Reversions.

N. Y. C. C., Sec. 225.

**SEC. 769.** When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

Remainders.

N. Y. C. C., Sec. 226.

**SEC. 770.** The provisions of Tit. II of Part I of this Division, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the

Limitations of chattels real.

absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

N. Y. C. C., Sec. 227.

Suspension  
by trust.

SEC. 771. The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of Sec. 715.

N. Y. C. C., Sec. 228.

Contingent  
remainder  
in fee.

SEC. 772. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.

N. Y. C. C., Sec. 229.

Remainders,  
future and  
contingent  
estates, how  
created.

SEC. 773. Subject to the rules of this Title, and of Part I of this Division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Title.

N. Y. C. C., Sec. 230.

Limitation  
of successive  
estates for  
life.

SEC. 774. Successive estates for life cannot be limited, except to persons in being at the creation thereof; and where a remainder is limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto are void, and upon the death of those persons the remainder, if valid in its creation, takes effect in the same manner as if no other life estates had been created.

N. Y. C. C., Sec. 231.

Remainder  
upon estates  
for life of  
third person.

SEC. 775. No remainder can be created upon an estate for the life of any other person than the grantee or de-



visée of such estate, unless such remainder is in fee; nor can a remainder be created upon such an estate in a term for years, unless it is for the whole residue of such term.

N. Y. C. C., Sec. 232.

**SEC. 776.** When a remainder is created upon an estate Same. for the life of any other person than the grantee or devisee thereof, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder, if valid in its creation, takes effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced.

N. Y. C. C., Sec. 233.

**SEC. 777.** A contingent remainder cannot be created Contingent remainder on a term of years. on a term of years, unless the nature of the contingency on which it is limited is such, that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

N. Y. C. C., Sec. 234.

**SEC. 778.** No estate for life can be limited as a remainder Remainder of estates for life. on a term of years, except to a person in being at the creation of such estate.

N. Y. C. C., Sec. 235.

**SEC. 779.** A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation. Remainder upon a contingency.

N. Y. C. C., Sec. 236.

**SEC. 780.** When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life. Heirs of a tenant for life, when to take as purchasers.

N. Y. C. C., Sec. 237.

**SEC. 781.** When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed in- Construction of certain remainders.

tended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years.

N. Y. C. C., Sec. 238.

Effect of  
power of  
appointment

SEC. 782. A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

N. Y. C. C., Sec., 239.

## CHAPTER II.

### TERMINATION OF ESTATES.

SECTION 788. Tenancy at will may be terminated by notice.

789. Form and service of notice.

790. Effect of notice.

791. Notice by tenant.

792. Double rent may be collected.

793. Re-entry, when and how to be made.

794. Summary proceedings in certain cases provided for.

795. Notice not necessary before action.

Tenancy at  
will may be  
terminated  
by notice.

SEC. 788. A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice to the tenant, in the manner prescribed by the next section, to remove from the premises within a period of not less than one month, to be specified in the notice.

N. Y. C. C., Sec. 240; Stats. 1861, 514, Sec. 1.

Form and  
service of  
notice.

SEC. 789. The notice prescribed by the last section must be in writing, and must be served by delivering the same to the tenant, or to some person of discretion residing on the premises; or if neither can, with reasonable diligence, be found, the notice may be served by affixing it on a conspicuous part of the premises, where it may be conveniently read.

N. Y. C. C., Sec. 241; Stats. 1861, 514, Sec. 2.

Effect of  
notice.

SEC. 790. After the notice prescribed by Secs. 788 and 789 has been served in the manner therein directed, and the period specified by such notice has expired, but not before, the landlord may re-enter, or proceed according to law to recover possession.

N. Y. C. C., Sec. 242; Stats. 1861, 514, Sec. 3.

**SEC. 791.** If any tenant shall give notice of his intention to quit the premises and shall not deliver up the possession at the time specified in the notice, he shall pay to the landlord double rent during the time he continues in possession after such notice.

Notice by tenant.

"Landlord and Tenant," Sec. 4.

**SEC. 792.** If any tenant, or any person in collusion with the tenant, shall hold over any lands or tenements after demand made and one month's notice in writing given, in the manner prescribed in Sec. 789, requiring the possession thereof, such person holding over shall pay to the landlord double rent during the time he continues in possession after such notice, and such special damages as may be suffered by the landlord.

Double rent may be collected.

"Landlord and Tenant," Sec. 5.

**SEC. 793.** Whenever the right of re-entry is given to a grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued, upon three days notice, as provided in Secs. 1161 and 1162, CODE OF CIVIL PROCEDURE.

Re-entry, when and how to be made.

N. Y. C. C., Sec. 243.

**SEC. 794.** Summary proceedings for obtaining possession of real property forcibly entered or forcibly and unlawfully detained, are provided in Secs. 1159 to 1175, both inclusive, of the CODE OF CIVIL PROCEDURE.

Summary proceedings in certain cases provided for.

**SEC. 795.** An action for the possession of real property leased or granted, with a right of re-entry, may be maintained at any time, in the District Court, after the right to re-enter has accrued, without the notice prescribed in Sec. 793.

Notice not necessary before action

N. Y. C. C., Sec. 244.

## CHAPTER III.

### SERVITUDES.

**SECTION 801.** Servitudes attached to land.

802. Servitudes not attached to land.

803. Designation of estates.

804. By whom grantable.

SECTION 805. By whom held.

806. Extent of servitudes.

807. Apportioning easements.

808. Rights of owner of future estate.

809. Actions by owner and occupant of dominant tenement.

810. Actions by owner of servient tenement.

811. How extinguished.

Servitudes  
attached to  
land.

SEC. 801. The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements :

1. The right of pasture.
2. The right of fishing.
3. The right of taking game.
4. The right of way.
5. The right of taking water, wood, minerals and other things.
6. The right of transacting business upon land.
7. The right of conducting lawful sports upon land.
8. The right of receiving air, light or heat from or over, or discharging the same upon or over, land.
9. The right of receiving water from or discharging the same upon land.
10. The right of flooding land.
11. The right of having water flow without diminution or disturbance of any kind.
12. The right of using a wall as a party wall.
13. The right of receiving more than natural support from adjacent land or things affixed thereto.
14. The right of having the whole of a division fence maintained by a coterminous owner.
15. The right of having public conveyances stopped, or of stopping the same, on land.
16. The right of a seat in church.
17. The right of burial.

N. Y. C. C., Sec. 245.

Servitudes  
not attached  
to land.

SEC. 802. The following land burdens, or servitudes upon land, may be granted and held, though not attached to land :

1. The right of fishing and taking game.
2. The right of a seat in church.
3. The right of burial.
4. The right of taking rents and tolls.
5. The right of way.

N. Y. C. C., Sec. 246.

**SEC. 803.** The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement.

Designation  
of estates.

N. Y. C. C., Sec. 247.

**SEC. 804.** A servitude can be created only by one who has a vested estate in the servient tenement.

By whom  
grantable.

N. Y. C. C., Sec. 248.

**SEC. 805.** A servitude thereon cannot be held by the owner of the servient tenement.

By whom  
held.

N. Y. C. C., Sec. 249.

**SEC. 806.** The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.

Extent of  
servitudes.

N. Y. C. C., Sec. 250.

**SEC. 807.** In case of partition of the dominant tenement, the burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement.

Apportion-  
ing ease-  
ments.

N. Y. C. C., Sec. 254.

**SEC. 808.** The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant.

Rights of  
owner of  
future estate

N. Y. C. C., Sec. 252.

**SEC. 809.** The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.

Actions by  
owner and  
occupant of  
dominant  
tenement.

N. Y. C. C., Sec. 253.

**SEC. 810.** The owner in fee of a servient tenement may maintain an action for the possession of the land, against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public.

Actions by  
owner of  
servient  
tenement.

N. Y. C. C., Sec. 254.

How extin-  
guished.

SEC. 811. A servitude is extinguished—

1. By the vesting of the right to the servitude and the right to the servient tenement in the same person.
2. By the destruction of the servient tenement.
3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or,
4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.

N. Y. C. C., Sec. 250.

### TITLE III.

#### RIGHTS AND OBLIGATIONS OF OWNERS.

##### CHAPTER I. RIGHTS OF OWNERS.

##### II. OBLIGATIONS OF OWNERS.

#### CHAPTER I.

##### RIGHTS OF OWNERS.

##### ARTICLE I. INCIDENTS OF OWNERSHIP.

##### II. BOUNDARIES.

#### ARTICLE I.

##### INCIDENTS OF OWNERSHIP.

##### SECTION 817. Water.

818. Rights of tenant for life.
819. Rights of tenant for years, etc.
820. Same.
821. Rights of grantees of rents and reversion.
822. Rights of lessees and their assignees, etc.
823. Remedy on leases for life.
824. Rent dependent on life.
825. Remedy of reversioners, etc.

Water.

SEC. 817. The owner of land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite

stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.

N. Y. C. C., Sec. 256.

**NOTE.**—Probably this section had better be omitted in the Code, and the whole subject of water rights postponed until a system for both *mining* and *irrigating* purposes can be carefully prepared. This would require two or three months of research, thought and careful arrangement.

**SEC. 818.** The owner of a life estate may use the land in the same manner as the owner of a fee simple, except that he must do no act to the injury of the inheritance. Rights of tenant for life.

N. Y. C. C., Sec. 257.

**SEC. 819.** A tenant for years or at will, unless he is a wrong-doer by holding over, may occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy, and cultivate and harvest the crops growing at the end of his tenancy. Rights of tenant for years, etc.

N. Y. C. C., Sec. 258.

**SEC. 820.** A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section. Same.

N. Y. C. C., Sec. 259.

**SEC. 821.** A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for non-performance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or deviser might have had. Rights of grantees of rents and reversion.

N. Y. C. C., Sec. 260.

**SEC. 822.** Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon Rights of lessees and their assigns, etc.

covenants against encumbrances or relating to the title or possession of the premises.

N. Y. C. C., Sec. 261.

Remedy on  
leases for life

SEC. 823. Rent due upon a lease for life may be recovered in the same manner as upon a lease for years

N. Y. C. C., Sec. 263.

Rent dependent on  
life.

SEC. 824. Rent dependent on the life of a person may be recovered after as well as before his death.

N. Y. C. C., Sec. 264.

Remedy of  
reversioners,  
etc.

SEC. 825. A person having an estate in fee, in remainder or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years, and although, after its commission, his estate is transferred, and he has no interest in the property at the commencement of the action.

N. Y. C. C., Sec. 265.

## ARTICLE II.

### BOUNDARIES.

#### SECTION 829. Rights of owner.

830. Boundaries by water.

831. Boundaries by ways.

832. Lateral and subjacent support.

833. Trees whose trunks are wholly on land of one.

834. Line trees.

Rights of  
owner.

SEC. 829. The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.

N. Y. C. C., Sec. 266.

Boundaries  
by water.

SEC. 830. When land borders upon tide land, or upon water which constitutes an exterior boundary of the State, the owner of the upland takes to high water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

N. Y. C. C., Sec. 267.



**Sec. 831.** An owner of land bounded by a road or street is presumed to own to the centre of the way, but the contrary may be shown.

Boundaries  
by ways.

N. Y. C. C., Sec. 268; *Kittle vs. Pfeiffer*, 29 Cal., 484.

**Sec. 832.** Each coterminous owner is entitled to the lateral and subjacent support which his land by nature receives from the land of the other.

Lateral and  
subjacent  
support.

N. Y. C. C., Sec. 269.

**Sec. 833.** Trees whose trunks stand wholly upon the land of one owner belong exclusively to him, although their roots grow into the land of another.

Trees whose  
trunks are  
wholly on  
land of one.

N. Y. C. C., Sec. 270.

**Sec. 834.** Trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common.

Line trees.

N. Y. C. C., Sec. 271.

## CHAPTER II.

### OBLIGATIONS OF OWNERS.

**SECTION 840.** Duties of tenant for life.

**841.** Monuments and fences.

**Sec. 840.** The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance.

Duties of  
tenant for  
life.

N. Y. C. C., Sec. 272.

**Sec. 841.** Coterminous owners are mutually bound equally to maintain—

Monuments  
and fences.

1. The boundaries and monuments between them.
2. The fences between them; unless one of them chooses to let his land lie without fencing; in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value, at that time, of any division fence made by the latter.

N. Y. C. C., Sec. 273.

## TITLE IV.

## USES AND TRUSTS.

**Section 847. What uses and trusts may exist.**

- 848. Right to possession of land creates legal ownership.
- 849. Certain trusts unaffected.
- 850. Trustees of estate for use of another take no interest.
- 851. Preceding sections qualified.
- 852. Trust must be in writing.
- 853. Transfer to one for money paid by another.
- 854. Rights of creditors.
- 855. Sec. 853 qualified.
- 856. Purchasers protected.
- 857. For what purposes express trusts may be created.
- 858. Certain devises in trust to be deemed powers.
- 859. Profits of land liable to creditors in certain cases.
- 860. Other express trusts to be powers in trust.
- 861. Creation of certain powers not prohibited.
- 862. And land, etc., to descend to persons entitled.
- 863. Trustees of express trusts to have whole estate.
- 864. Author of trust may devise, etc.
- 865. Title of grantor of trust property.
- 866. Interests remaining in grantor of express trust.
- 867. Powers over trust of party interested.
- 868. Same.
- 869. Effect of omitting trust in conveyance.
- 870. Certain sales, etc., by Trustees, void.
- 871. When estate of Trustee to cease.

What uses  
and trusts  
may exist.

**Sec. 847. Uses and trusts in relation to real property, are those only which are specified in this Title.**

N. Y. C. C., Sec. 274.

Right to  
possession of  
land creates  
legal owner-  
ship.

**Sec. 848. Every person who, by virtue of any transfer or devise, is entitled to the actual possession of real property, and the receipt of the rents and profits thereof, is to be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.**

N. Y. C. C., Sec. 276.

Certain  
trusts un-  
affected.

**Sec. 849. The last section does not divest the estate of any Trustee in a trust, where the title of such Trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust.**

N. Y. C. C., Sec. 277.

**Sec. 850.** Every disposition of real property, whether by transfer or will, must be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to any other, to the use of or in trust for such person; and if made to any person, to the use of or in trust for another, no estate or interest vests in the Trustee; but he must execute a release of the property to the beneficiary on demand, the latter paying the expense thereof.

Trustees of estate for use of another take no interest.

N. Y. C. C., Sec. 278.

**Sec. 851.** The preceding sections of this Title do not extend to trusts arising or resulting by implication of law, nor prevent or affect the creation of such express trusts as are hereinafter authorized and defined.

Preceding sections qualified.

N. Y. C. C., Sec. 279.

**Sec. 852.** No trust in relation to real property is valid, unless created or declared—

Trust must be in writing

1. By a written instrument, subscribed by the Trustee, or by his agent thereto authorized by writing.
2. By the instrument under which the Trustee claims the estate affected; or,
3. By operation of law.

N. Y. C. C., Sec. 280; Cal. C. C. P., Sec. 1971.

**Sec. 853.** Where a transfer of real property is made to one person, and the consideration therefor is paid by or for another, no use or trust results in favor of the person by or for whom such payment is made; but the title vests in the grantee, subject only to the provisions of the next two sections.

Transfer to one for money paid by another.

N. Y. C. C., Sec. 281.

**Sec. 854.** Every such transfer as is described in the last section is presumed to be fraudulent as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust results in favor of such creditors, to the extent necessary to satisfy their just demands.

Rights of creditors.

N. Y. C. C., Sec. 282.

**Sec. 855.** Sec. 853 does not apply—

1. To cases where the grantee took the grant as an absolute transfer in his own name, without the consent or knowledge of the person paying the consideration; nor,

Sec. 853 qualified.

2. To cases where the grantee, in violation of a trust, purchased the real property so transferred, with property belonging to another person.

N. Y. C. C., Sec. 283.

Purchasers  
protected.

SEC. 856. No implied or resulting trust can prejudice the rights of a purchaser or encumbrancer of real property, for value and without notice of the trust.

N. Y. C. C., Sec. 284.

For what  
purposes ex-  
press trusts  
may be  
created.

SEC. 857. Express trusts may be created for any of the following purposes :

1. To sell real property for the benefit of creditors.
2. To sell, mortgage or lease real property, for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person, or for any shorter term, subject to the rules of Tit. II of this Part; or,
4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the same Title.

N. Y. C. C., Sec. 285.

Certain de-  
vises in  
trust to be  
deemed  
powers.

SEC. 858. A devise of real property to executors or other Trustees, to be sold or mortgaged, where the Trustees are not also empowered to receive the rents and profits, vests no estate in them; but the trust is valid as a power in trust.

N. Y. C. C., Sec. 286.

Profits of  
land liable  
to creditors  
in certain  
cases.

SEC. 859. Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person, in the same manner as personal property which cannot be reached by execution.

N. Y. C. C., Sec. 287.

**SEC. 860.** Where an express trust in relation to real property is created for any purpose not enumerated in the preceding sections, such trust vests no estate in the Trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers contained in Tit. V of this Part.

Other express trusts to be powers in trust.

N. Y. C. C., Sec. 288.

**SEC. 861.** Nothing in this Title prevents the creation of a power in trust for any of the purposes for which an express trust may be created.

Creation of certain powers not prohibited.

N. Y. C. C., Sec. 289.

**SEC. 862.** In every case where a trust is valid as a power in trust, the real property to which the trust relates remains in, or passes by succession to, the persons otherwise entitled, subject to the execution of the trust as a power in trust.

And land, etc., to descend to persons entitled

N. Y. C. C., Sec. 290.

**SEC. 863.** Except as hereinafter otherwise provided, every express trust in real property, valid as such, in its creation, vests the whole estate in the Trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.

Trustees of express trusts to have whole estate.

N. Y. C. C., Sec. 291.

**SEC. 864.** Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust.

Author of trust may devise, etc.

N. Y. C. C., Sec. 292.

**SEC. 865.** The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the Trustees and those lawfully claiming under them.

Title of grantor of trust property.

N. Y. C. C., Sec. 293.

Interests  
remaining  
in grantor of  
express trust

SEC. 866. Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust, or his successors.

N. Y. C. C., Sec. 294.

Powers over  
trust of party  
interested.

SEC. 867. The beneficiary of a trust for the receipt of the rents and profits of real property cannot transfer or in any manner dispose of his interest in such trust.

N. Y. C. C., Sec. 295.

Same.

SEC. 868. The beneficiary of a trust for the payment of an annuity out of the rents and profits of real property, or of a sum in gross, can dispose of his interest in such trust.

N. Y. C. C., Sec. 296.

Effect of  
omitting  
trust in con-  
veyance.

SEC. 869. Where an express trust is created in relation to real property, but is not contained or declared in the grant to the Trustee, such grant must be deemed absolute in favor of the subsequent creditors of the Trustees, not having notice of the trust, and in favor of purchasers from such Trustees, without notice, and for a valuable consideration.

N. Y. C. C., Sec. 297.

Certain  
sales, etc.,  
by Trustees,  
void.

SEC. 870. Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the Trustees, in contravention of the trust, is absolutely void.

N. Y. C. C., Sec. 298.

When estate  
of Trustee  
to cease.

SEC. 871. When the purpose for which an express trust was created ceases, the estate of the Trustee also ceases.

N. Y. C. C., Sec. 299.

## TITLE V.

### POWERS.

SECTION 877. What powers exist.

878. Application of this Title.

879. Definition of a power.

880. Terms "author of a power" and "holder of a power" defined.

- Section** 881. Division of powers.
882. Definition of general powers.
883. Definition of special powers.
884. Beneficial powers.
885. Powers in trust.
886. General powers, when in trust.
887. Special powers, when in trust.
888. Who may create power.
889. To whom power may be given.
890. How created.
891. Reservation of powers in conveyances.
892. When power irrevocable.
893. When power a lien.
894. Power of sale in mortgage.
895. Beneficial powers, etc., transferred by insolvent assignments.
896. Who to execute powers.
897. Married women.
898. Same.
899. How executed.
900. Execution by survivors.
901. Execution of power to dispose by devise.
902. Execution of power to dispose by grant.
903. Directions by author, when disregarded.
904. Same.
905. Nominal conditions.
906. When directions of author to be observed.
907. Consent of third person to execution of power.
908. Same.
909. Omission to recite power.
910. Instruments deemed conveyances.
911. Certain dispositions not void.
912. Computation of term of suspension.
913. What estate may be given.
914. Married women, their authority.
915. Defective execution.
916. Fraud.
917. General and beneficial powers to married women.
918. Estate of owner for life, etc., when changed into a fee.
919. Certain powers create a fee.
920. Same.
921. Effect of power to devise inheritance in certain cases.
922. Power to dispose of fee.
923. Power to revoke.
924. Special and beneficial powers, who may take.
925. Construction of leasing powers.
926. Power to make leases by owner for life.
927. Release of such power.
928. Mortgages by party having power to lease, etc.
929. Effect thereof.
930. Special and beneficial powers liable to creditors.
931. Future beneficial powers.
932. Trust powers imperative.
933. Effect of right of selection.
934. Construction of certain powers.

**SECTION 935. Same.**

936. When Court to execute power.

937. Same.

938. Execution of trust power when compelled by creditors, etc.

939. Defective execution.

940. Application of certain sections.

**What powers exist.**

**SEC. 877.** Powers, in relation to real property, are those only which are specified in this Title.

N. Y. C. C., Sec. 300.

**Application of this Title.**

**SEC. 878.** The provisions of this Title do not extend to a simple power of attorney to convey real property in the name of the owner and for his benefit.

N. Y. C. C., Sec. 301.

**Definition of a power.**

**SEC. 879.** A power, as the term is used in this Title, is an authority to do some act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner granting or reserving such power might himself perform for any purpose.

N. Y. C. C., Sec. 302.

**Terms "author of a power" and "holder of a power" defined.**

**SEC. 880.** The author of a power, as the term is used in this Title, is the person by whom a power is created, whether by grant or devise; and the holder of a power is the person in whom a power is vested, whether by grant, devise or reservation.

N. Y. C. C., Sec. 303.

**Division of powers.**

**SEC. 881.** Powers are general or special, and beneficial or in trust.

N. Y. C. C., Sec. 304.

**Definition of general powers.**

**SEC. 882.** A power is general, when it authorizes the alienation or encumbrance of a fee in the property embraced therein, by grant, will or charge, or any of them, in favor of any person whatever.

N. Y. C. C., Sec. 305.

**Definition of special powers.**

**SEC. 883.** A power is special—

1. When a person or class of persons is designated, to whom the disposition of property under the power is to be made; or,

2. When it authorizes the alienation or encumbrance, by means of a grant, will or charge, of only an estate less than a fee.

N. Y. C. C., Sec. 306.



**SEC. 884.** A power is beneficial, when no person other than its holder has, by the terms of its creation, any interest in its execution.

Beneficial powers.

N. Y. C. C., Sec. 307.

**SEC. 885.** A power is in trust, when any person or class of persons, other than its holder, has, by the terms of its creation, an interest in its execution.

Powers in trust.

N. Y. C. C., Sec. 308.

**SEC. 886.** A general power is in trust, when any person or class of persons, other than its holder, is designated as entitled to the proceeds of the disposition or charge authorized by the power, or to any portion of the proceeds or other benefits to result from its execution.

General powers, when in trust.

N. Y. C. C., Sec. 309.

**SEC. 887.** A special power is in trust—

1. When the disposition or charge which it authorizes is limited to be made to any person or class of persons, other than the holder of the power; or,

Special powers, when in trust.

2. When any person or class of persons, other than the holder, is designated as entitled to any benefit from the disposition or charge authorized by the power.

N. Y. C. C., Sec. 310.

**SEC. 888.** No person is capable of creating a power, who is not at the same time capable of granting some estate in the property to which the power relates.

Who may create power

N. Y. C. C., Sec. 311.

**SEC. 889.** A power may be vested in any person.

N. Y. C. C., Sec. 312.

To whom power may be given.

**SEC. 890.** A power may be created only—

How created

1. By a suitable clause, contained in a grant of some estate in the real property to which the power relates, or in an agreement to execute such a grant; or,

2. By a devise contained in a will.

N. Y. C. C., Sec. 313.

**SEC. 891.** The grantor in any conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and every power thus

Reservation of powers in conveyances

reserved is subject to the provisions of this Title in the same manner as if granted to another.

N. Y. C. C., Sec. 314.

When power  
irrevocable.

SEC. 892. Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is given or reserved in the instrument creating the power.

N. Y. C. C., Sec. 315.

When power  
a lien.

SEC. 893. A power is a lien upon the real property which it embraces, from the time the instrument in which it is contained takes effect; except that against creditors, purchasers and encumbrancers, in good faith and without notice from any person having an estate in such real property, the power is a lien only from the time the instrument in which it is contained is duly recorded.

N. Y. C. C., Sec. 316.

Power of sale  
in mortgage.

SEC. 894. Where a power to sell real property is given to a mortgagee or other encumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid; but such power is subject to the provisions of Chap. —, CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 317.

Beneficial  
powers, etc.,  
transferred  
by insolvent  
assignments.

SEC. 895. Every beneficial power, and the interest of every person entitled to compel the execution of a trust power, passes to the assignees, pursuant to statute, of the estate of a non-resident, absconding, insolvent or imprisoned debtor, or of a person of unsound mind, in whom such a power or interest is vested.

N. Y. C. C., Sec. 318.

Who to exe-  
cute powers.

SEC. 896. A power cannot be executed by any person not capable of disposing of real property.

N. Y. C. C., Sec. 319.

Married  
women.

SEC. 897. A married woman may execute a power during her marriage, without the concurrence of her husband, unless otherwise prescribed by the terms of the power.

N. Y. C. C., Sec. 320.

**Sec. 898.** No power can be executed by a married woman before she attains her majority, nor without being acknowledged by her in the manner prescribed by the chapter on *Recording Transfers*.

N. Y. C. C., Sec. 321.

**Sec. 899.** A power can be executed only by a written instrument which would be sufficient to pass the estate or interest intended to pass under the power, if the person executing the power was the actual owner.

N. Y. C. C., Sec. 322.

**Sec. 900.** Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power.

N. Y. C. C., Sec. 323.

**Sec. 901.** Where a power to dispose of real property is confined to a disposition by devise or will, the instrument of execution must be a will duly executed according to the provisions of the Title on *Wills*.

N. Y. C. C., Sec. 324.

**Sec. 902.** Where a power is confined to a disposition by grant, it cannot be executed by will, even though the disposition is not intended to take effect until after the death of the person executing the power.

N. Y. C. C., Sec. 325.

**Sec. 903.** Where the author of a power has directed or authorized it to be executed by an instrument which would not be sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the rules before prescribed in this Title.

N. Y. C. C., Sec. 326.

**Sec. 904.** Where the author of a power has directed any formalities to be observed in its execution, in addition to those which would be sufficient to pass the estate, the observance of such additional formalities is not necessary to a valid execution of the power.

N. Y. C. C., Sec. 327.

Nominal  
conditions.

SEC. 905. Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power.

N. Y. C. C., Sec. 328.

When direc-  
tions of  
author to be  
observed.

SEC. 906. With the exceptions contained in the preceding sections, the intentions of the author of a power, as to the mode, time and conditions of its execution, must be observed, subject to the power of the Court to supply a defective execution in the cases provided in Secs. 915 and 939.

N. Y. C. C., Sec. 329.

Consent of  
third person  
to execution  
of power.

SEC. 907. When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed, or be certified in writing thereon. In the first case the instrument of execution, in the second, the certificate, must be subscribed by the party whose consent is required; and to entitle the instrument to be recorded, such signature must be duly proved or acknowledged, according to the chapter on *Recording Transfers*.

N. Y. C. C., Sec. 330.

Same.

SEC. 908. Where the consent of several persons to the execution of a power is requisite, all must consent thereto; but, in case any one or more of them is dead, the consent of the survivors is sufficient, unless otherwise prescribed by the terms of the power.

N. Y. C. C., Sec. 331.

Omission to  
recite power

SEC. 909. Every instrument executed by the holder of a power, conveying an estate or creating a charge which such holder would have no right to convey or create except by virtue of his power, is to be deemed a valid execution of the power, even though not recited or referred to therein.

N. Y. C. C., Sec. 332.

Instruments  
deemed  
conveyances

SEC. 910. Every instrument, except a will, in execution of a power, even though the power is one of revocation only, is to be deemed a conveyance, within the meaning of the chapter on *Recording Transfers*.

N. Y. C. C., Sec. 333.

**SEC. 911.** A disposition or charge, by virtue of a power, more extensive than was authorized thereby, is not therefore void; but every estate or interest so created, so far as it is embraced by the terms of the power, is valid.

N. Y. C. C., Sec. 334.

Certain dispositions not void.

**SEC. 912.** The period during which the absolute right of alienation may be suspended by an instrument in execution of a power, must be computed, not from the date of the instrument, but from the time of the creation of the power.

N. Y. C. C., Sec. 335.

Computation of term of suspension.

**SEC. 913.** No estate or interest can be given or limited to any person, by an instrument in execution of a power, which could not have been given or limited at the time of the creation of the power.

N. Y. C. C., Sec. 336.

What estate may be given.

**SEC. 914.** When a married woman, entitled to an estate in fee, is authorized by a power to dispose of such estate during her marriage, she may, by virtue of such power, create any estate which she might create if unmarried.

N. Y. C. C., Sec. 337.

Married women, their authority.

**SEC. 915.** Purchasers for a valuable consideration, claiming under a defective execution of a power, are entitled to the same relief as similar purchasers claiming under a defective conveyance from an actual owner.

N. Y. C. C., Sec. 338.

Defective execution.

**SEC. 916.** Instruments in execution of a power are affected by fraud in the same manner as like instruments executed by owners or Trustees.

N. Y. C. C., Sec. 339.

Fraud.

**SEC. 917.** A general and beneficial power is valid, which gives to a married woman power to dispose, during her marriage, and without the concurrence of her husband, of a present or future estate in real property conveyed or devised to her in fee.

N. Y. C. C., Sec. 340.

General and beneficial powers to married women.

**SEC. 918.** Where an absolute power of disposition, not accompanied by any trust, is given to the owner of a par-

Estate of owner for life, etc., when changed into a fee

ticular estate for life or years, such estate is changed into a fee, absolute in favor of creditors, purchasers and encumbrancers, but subject to any future estates limited thereon, in case the power should not be executed, or the property should not be sold for the satisfaction of debts.

N. Y. C. C., Sec. 341.

Certain powers create a fee.

SEC. 919. Where an absolute power of disposition, not accompanied by any trust, is given to any person to whom no particular estate is limited, such person also takes a fee, subject to any future estate that may be limited thereon, but absolute in favor of creditors, purchasers and encumbrancers.

N. Y. C. C., Sec. 342.

Same.

SEC. 920. In all cases where an absolute power of disposition is given, not accompanied by any trust, and no remainder is limited on the estate of the holder of the power, he is entitled to an absolute fee.

N. Y. C. C., Sec. 343.

Effect of power to devise inheritance in certain cases

SEC. 921. Where a general and beneficial power to devise the inheritance is given to the owner of an estate for life or for years, he is deemed to possess an absolute power of disposition, within the meaning of the last three sections.

N. Y. C. C., Sec. 344.

Power to dispose of fee.

SEC. 922. Every power of disposition is deemed absolute, by means of which the holder is enabled, in his lifetime, to dispose of the entire fee, in possession or in expectancy, for his own benefit.

N. Y. C. C., Sec. 345.

Power to revoke.

SEC. 923. Where the grantor in any conveyance reserves to himself, for his own benefit, an absolute power of revocation, such grantor is still to be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

N. Y. C. C., Sec. 346.

Special and beneficial powers, who may take.

SEC. 924. A special and beneficial power is valid which is granted—

1. To a married woman to dispose, during the marriage, of any estate less than a fee, belonging to her, in the property to which the power relates; or,

2. To the owner of a life estate in the property embraced in the power, to make leases for not more than twenty-one years, commencing in possession during his life.

N. Y. C. C., Sec. 347.

SEC. 925. A special and beneficial power to make leases of agricultural land for more than ten years, or of town and city lots for more than twenty years, is void only as to the time beyond ten or twenty years, and authorizes leases for those terms or less.

Construction of leasing powers.

N. Y. C. C., Sec. 348; Stats. 1851, 169, Sec. 1.

SEC. 926. The power of the owner of a life estate to make leases is not transferable as a separate interest, but is annexed to his estate, and will pass, unless specially excepted, by any grant of such estate. If specially excepted in any such grant, it is extinguished.

Power to make leases by owner for life.

N. Y. C. C., Sec. 349.

SEC. 927. The power of the owner of a life estate to make leases may be released by him to any person entitled to a future estate in the property, and is thereupon extinguished.

Release of such power.

N. Y. C. C., Sec. 350.

SEC. 928. A mortgage, executed by the owner of a life estate having a power to make leases, or by a married woman, by virtue of any beneficial power, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein.

Mortgages by party having power to lease, etc.

N. Y. C. C., Sec. 351.

SEC. 929. The effects on the power of a lien by mortgage, such as is mentioned in the last section, are—

Effect thereof.

1. That the mortgagee is entitled to an execution of the power, so far as the satisfaction of his lien may require it; and,

2. That any subsequent estate created by the owner, in execution of the power, becomes subject to the mortgage in the same manner as if in terms embraced therein.

N. Y. C. C., Sec. 352.

SEC. 930. Every special and beneficial power is liable to the claims of creditors in the same manner as other

Special and beneficial powers liable to creditors.

interests that cannot be reached by execution, and the execution of the power may be adjudged for the benefit of the creditors entitled.

N. Y. C. C., Sec. 353.

Future beneficial powers

SEC. 931. No beneficial power, general or special, not already specified and defined in this Title, can hereafter be created.

N. Y. C. C., Sec. 354.

Trust powers imperative.

SEC. 932. Every trust power, unless its execution is made expressly to depend on the will of the Trustee, is imperative, and imposes a duty on the Trustee, the performance of which may be compelled for the benefit of the parties interested.

N. Y. C. C., Sec. 355.

Effect of right of selection.

SEC. 933. A trust power does not cease to be imperative where the Trustee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust.

N. Y. C. C., Sec. 356.

Construction of certain powers.

SEC. 934. Where a disposition under a power is directed to be made to, among or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated are entitled in equal proportion.

N. Y. C. C., Sec. 357.

Same.

SEC. 935. Where the terms of a power import that the estate or fund is to be distributed among several persons designated, in such manner or proportions as the Trustee of the power may think proper, the Trustee may allot the whole to any one or more of such persons in exclusion of the others.

N. Y. C. C., Sec. 358.

When Court to execute power.

SEC. 936. If the Trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as objects of the trust.

N. Y. C. C., Sec. 359.

Same.

SEC. 937. Where a power in trust is created by will, and the testator has omitted to designate, expressly or by



necessary implication, by whom the power is to be executed, its execution devolves on the District Court.

N. Y. C. C., Sec. 360.

**SEC. 938.** The execution, in whole or in part, of any trust power, may be adjudged for the benefit of the creditors or assignees of any person entitled, as one of the beneficiaries of the trust, to compel its execution, when his interest is transferable.

Execution of trust power when compelled by creditors, etc

N. Y. C. C., Sec. 361.

**SEC. 939.** Where the execution of a power in trust is defective, in whole or in part, under the provisions of this Title, its proper execution may be adjudged in favor of the persons designated as the objects of the trust.

Defective execution.

N. Y. C. C., Sec. 362.

**SEC. 940.** The provisions of the Title on *Trust*, saving the rights of other persons from prejudice by the misconduct of Trustees, and authorizing the Court to remove and appoint Trustees; the provisions of the Title on *Succession*, devolving express trusts upon the Court, on the death of the Trustee; and the provisions of Sec. 871, in the Title on *Uses and Trusts*, apply equally to powers in trust, and the Trustees of such power.

Application of certain sections.

N. Y. C. C., Sec. 363.



# PART III.

## PERSONAL OR MOVABLE PROPERTY.

### TITLE I. PERSONAL PROPERTY IN GENERAL.

### II. PARTICULAR KINDS OF PERSONAL PROPERTY.

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## TITLE I.

### PERSONAL PROPERTY IN GENERAL.

SECTION 946. By what law governed.

947. Future interests in perishable property, how protected.

SEC. 946. If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile.

By what law governed.

N. Y. C. C., Sec. 364.

SEC. 947. Where one has the present and another the future interest in a thing personal, and the thing is perishable, the latter may require it to be sold, and the proceeds invested for the benefit of both parties, according to their respective interests; except in case of a thing specially appropriated to a particular use.

Future interests in perishable property, how protected.

N. Y. C. C., Sec. 365.

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## TITLE II.

### PARTICULAR KINDS OF PERSONAL PROPERTY.

#### CHAPTER I. THINGS IN ACTION.

##### II. SHIPPING.

##### III. PRODUCTS OF THE MIND.

##### IV. OTHER KINDS OF PERSONAL PROPERTY.

## CHAPTER I.

## THINGS IN ACTION.

SECTION 953. Things in action defined.

954. Transfer and survivorship.

Things in  
action de-  
fined.

SEC. 953. A thing in action is a right to recover something by a judicial proceeding.

N. Y. C. C., Sec. 366.

Transfer and  
survivorship

SEC. 954. A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the CODE OF CIVIL PROCEDURE, it passes to his devisees or successor in office.

N. Y. C. C., Sec. 367.

## CHAPTER II.

## SHIPPING.

ARTICLE I. GENERAL PROVISIONS.

II. RULES OF NAVIGATION.

## ARTICLE I.

## GENERAL PROVISIONS.

SECTION 960. Definition of a ship.

961. Appurtenances and equipments.

962. Foreign and domestic navigation.

963. Foreign and domestic ships distinguished.

964. Several owners.

965. Owner for voyage.

966. Registry, etc.

Definition  
of a ship.

SEC. 960. A ship is any structure fitted for navigation. Every kind of ship is included in the term "shipping."

N. Y. C. C., Sec. 368.

Appurte-  
nances and  
equipments.

SEC. 961. All things, belonging to the owners, which are on board a ship, and are connected with its proper

use, for the objects of the voyage and adventure in which the ship is engaged, are deemed its appurtenances.

N. Y. C. C., Sec. 369.

SEC. 962. Ships are engaged either in foreign or domestic navigation, or in the fisheries. Ships are engaged in foreign navigation when passing to or from a foreign country; and in domestic navigation, when passing from place to place within the United States.

Foreign and domestic navigation.

N. Y. C. C., Sec. 370.

SEC. 963. A ship in a port of the State to which it belongs is called a domestic ship; in another port it is called a foreign ship.

Foreign and domestic ships distinguished.

N. Y. C. C., Sec. 371.

SEC. 964. If a ship belongs to several persons, not partners, and they differ as to its use or repair, the controversy may be determined by any Court of competent jurisdiction.

Several owners.

N. Y. C. C., Sec. 372.

SEC. 965. If the owner of a ship commits its possession and navigation to another, that other, and not the owner, is responsible for its repairs and supplies.

Owner for voyage.

N. Y. C. C., Sec. 373.

SEC. 966. The registry, enrolment and license of ships are regulated by Acts of Congress.

Registry, etc.

N. Y. C. C., Sec. 374.

## ARTICLE II.

### RULES OF NAVIGATION.

#### SECTION 970. Collisions.

1. Rules as to ships meeting each other.
2. The rule for sailing vessels.
3. Rules for steamers in narrow channels.
4. Same.
5. Rules for steam vessels on different courses.
6. Meeting of steamers.

971. Collision from breach of rules.

972. Breaches of such rules to imply wilful default.

973. Loss, how apportioned.

Collisions.

SEC. 970. In the case of ships meeting, the following rules must be observed, in addition to those prescribed by that part of the POLITICAL CODE which relates to *Navigation* :

Rules as to ships meeting each other.

1. Whenever any ship, whether a steamer or sailing ship, proceeding in one direction, meets another ship, whether a steamer or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve the risk of a collision, the helms of both ships must be put to port so as to pass on the port side of each other; and this rule applies to all steamers and all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, except where the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to a due regard to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command.

The rule for sailing vessels.

2. In the case of sailing vessels, those having the wind fair must give way to those on a wind. When both are going by the wind, the vessel on the starboard tack must keep her wind, and the one on the larboard tack bear up strongly, passing each on the laboard hand. When both vessels have the wind large or abeam, and meet, they must pass each other in the same way on the larboard hand, to effect which two last mentioned objects the helm must be put to port. Steam vessels must be regarded as vessels navigating with a fair wind, and should give way to sailing vessels on a wind of either tack.

Rules for steamers in narrow channels.

3. A steamer navigating a narrow channel must, whenever it is safe and practicable, keep to that side of the fairway or mid channel which lies on the starboard side of the steamer.

Same.

4. A steamer when passing another steamer in such channel, must always leave the other upon the larboard side.

Rules for steam vessels on different courses.

5. When steamers must inevitably or necessarily cross so near that, by continuing their respective courses, there would be a risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of each other.

6. The rules of this section do not apply to any case for which a different rule is provided by the regulations for the government of pilots of steamers approaching each other within sound of the steam whistle, or by the regulations concerning lights upon steamers, prescribed under authority of the Acts of Congress approved August thirtieth, eighteen hundred and fifty-two, and April twenty-ninth, eighteen hundred and sixty-four.

Meeting of  
steamers.

N. Y. C. C., Sec. 375.

NOTE.—For regulations prescribed by the Acts mentioned in Subd. 6, see note at end of this article.

SEC. 971. If it appears that a collision was occasioned by failure to observe any rule of the foregoing section, the owner of the ship by which such rule is infringed cannot recover compensation for damages sustained by the ship in such collision, unless it appears that the circumstances of the case made a departure from the rule necessary.

Collision  
from breach  
of rules.

N. Y. C. C., Sec. 376.

SEC. 972. Damage to person or property arising from the failure of a ship to observe any rule of Sec. 970, must be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it appears that the circumstances of the case made a departure from the rule necessary.

Breaches of  
such rules  
to imply  
wilful  
default.

N. Y. C. C., Sec. 377.

SEC. 973. Losses caused by collision are to be borne as follows :

Loss, how  
apportioned.

1. If either party was exclusively in fault he must bear his own loss, and compensate the other for any loss he has sustained.

2. If neither was in fault, the loss must be borne by him on whom it falls.

3. If both were in fault, the loss is to be equally divided, unless it appears that there was a great disparity in fault, in which case the loss must be equitably apportioned.

4. If it cannot be ascertained where the fault lies, the loss must be equally divided.

N. Y. C. C., Sec. 378.

## NOTE.

The regulations prescribed by the Board of Inspectors, under authority of the Act of 1852, are as follows :

All pilots of steamers navigating seas, gulfs, lakes, bays or rivers (except rivers emptying into the Gulf of Mexico and their tributaries), when meeting or approaching each other, whether by day or by night, and as soon as within sight and fully within sound of the steam whistle, shall observe and comply with the following

## REGULATIONS.

**RULE 1.** When steamers meet "head and head," it shall be the duty of each to pass to the right or larboard side of the other. And either pilot, upon determining to pursue this course, shall give, as a signal of his intention, *one* short and distinct blast of his steam whistle, which the other shall answer promptly by a similar blast of the whistle. But if the course of each steamer is so far on the starboard of the other as not to be considered by the rules as meeting "head and head," or if the vessels are approaching in such a manner, that passing to the right (as above directed) is deemed unsafe, or contrary to rule, by the pilot of either vessel, the pilot so deciding shall immediately give *two* short and distinct blasts of his steam whistle, which the other pilot shall answer promptly by *two* similar blasts of his whistle, and they shall pass to the left or on the starboard side of each other.

**NOTE.**—*In the night*, steamers will be considered meeting "head and head" so long as both the colored lights of each are in view of the other. *In the day*, a similar position will also be considered "head and head."

**RULE 2.** When steamers are approaching each other in an oblique direction (as shown in diagram of fifth situation), they will pass to the right, as if meeting "head and head," and the signal, by whistle, shall be given and answered promptly, as in that case specified.

**RULE 3.** If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from the signals being given and answered erroneously, or from other cause, the pilot, so in doubt, shall immediately signify the same by giving several short and rapid blasts of the steam whistle, and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steering way, until the proper signals are given, answered and understood, or until the vessels shall have passed each other.

**RULE 4.** When steamers are running in a fog or thick weather, it shall be the duty of the pilot to cause a *long* blast of the steam whistle to be sounded at intervals not exceeding two minutes. And no steamer shall, in any case, be justified in coming into collision with another vessel if it be possible to avoid it.

**RULE 5.** Whenever a steamer is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer, when he shall have arrived within half a mile of such curve or bend, shall give a signal by *one* long blast of the steam whistle, which signal shall be answered by a similar blast given by the pilot of any approaching steamer that may be within hearing. Should such signal be so answered by a steamer upon the further side of such bend, then the usual signals for meeting and passing shall immediately be given and answered. But if the *first* alarm signal of such pilot be not answered, he is to consider the channel clear, and govern himself accordingly.

**RULE 6.** The signals by blowing of the steam whistle shall be given and answered by pilots in compliance with these rules, not only when meeting "head and head," or nearly so, but at all times, when passing or meeting, at a distance within half a mile of each other, and whether passing to the starboard or larboard.

**N. B.**—The foregoing rules are to be complied with in all cases, except when steamers are navigating in a crowded channel or in the vicinity of wharves—under these circumstances steamers must be run and managed with great caution, sounding the whistle as may be necessary to guard against collision or other accidents.

## STEAMERS' LIGHTS, TO PREVENT COLLISION AT NIGHT.

**RULE 7.** *When under weigh.* All steamers rigged for carrying sail must carry a bright white light at the foremast head, and all other steamers must



carry a bright white light on the *stem* or near the bow, and another on a mast near the stern, or on the flag-staff at the *stern*, the last named being at an elevation of at least twenty feet above all other lights upon the steamer. All steamers must carry a green light upon the starboard side, and a red light on the port side.

**NOTE.**—Steamers, although rigged for carrying sail, instead of the foremast head light, may adopt the forward and stern lights provided for steamers not rigged for carrying sail, provided such lights are so arranged and placed on the vessel as to secure the contemplated objects.

**When at anchor.** A bright white light, at least twenty feet above the surface of the water. The lantern so constructed and placed as to show a good light all around the horizon.

1. The masthead light of steamers rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the lantern to be so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the ship.

2. The stem and stern lights of the steamers not rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the respective lanterns to be so constructed that the stem light shall show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the ship, and that the stern light shall show a uniform light all around the horizon.

3. The colored side lights to be visible at a distance of at least two miles in a clear dark night; and the lanterns to be so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, namely, from right ahead to two points abaft the beam on their respective sides.

4. The side lights are to be fitted with inboard screens of at least six feet in length (clear of the lantern), to prevent them from being seen across the bow. The screens are to be placed in a fore and aft line with the inner edge of the side lights, and in contact therewith.

**NOTE 1.** The object of carrying the bright white light at the foremast head of steamers rigged for carrying sail is merely to intimate to other vessels the approach or presence of such steamer.

**NOTE 2.** The object of the colored lights required to be carried on all steamers, is to indicate to other vessels the course or direction such steamer may be steering.

**NOTE 3.** The object of requiring steamers not rigged for carrying sail to carry a white stern light in connection with a white light on the stem or near the bow, is to provide (when the vessel's rig will admit of it) a method of determining, by a central range of lights, more correctly the course that such vessel is running.

The regulations of the Act of April 29, 1864, which apply to all "mercantile marine," are as follows :

#### REGULATIONS FOR PREVENTING COLLISIONS ON WATER.

##### *Preliminary.*

**ARTICLE 1.** *What to be considered sailing ships and what ships under steam.* In the following rules every steamship which is under sail, and not under steam, is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

#### RULES CONCERNING LIGHTS.

##### *Lights.*

**ART. 2.** The lights mentioned in the following articles, and no others, shall be carried in all weathers between sunset and sunrise.

##### *Lights for Steamships.*

**ART. 3.** All steam vessels when under way shall carry—

(a.) At the foremast head, a bright white light, so fixed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, viz : from right ahead to two points abaft the beam on either side, and of such a

character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(b.) On the starboard side, a green light, so constructed as to throw an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(c.) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(d.) The said green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

*Lights for Steam-tugs.*

ART. 4. Steamships, when towing other ships, shall carry two bright white masthead lights vertically, in addition to their side lights, so as to distinguish them from other steamships. Each of these masthead lights shall be of the same construction and character as the masthead lights which other steamships are required to carry.

*Lights for Sailing Ships.*

ART. 5. Sailing ships under way or being towed, shall carry the same lights as steamships under way, with the exception of the white masthead lights, which they shall never carry.

*Exceptional Lights for small Sailing Vessels.*

ART. 6. Whenever, as in the case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side. To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens.

*Lights for Ships at Anchor.*

ART. 7. Ships, whether steamships or sailing ships, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light, visible all around the horizon, and at a distance of at least one mile.

*Lights for Pilot Vessels.*

ART. 8. Sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare-up light every fifteen minutes.

*Lights for Fishing Vessels and Boats.*

ART. 9. Open fishing-boats and other open boats shall not be required to carry side lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on the one side and a red slide on the other side, and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side. Fishing vessels and open boats, when at anchor or attached to their nets and stationary, shall exhibit a bright white light. Fishing vessels and open boats shall, however, not be prevented from using a flare-up in addition, if considered expedient.

**RULES GOVERNING FOG-SIGNALS.**

*Fog-signals.*

ART. 10. Whenever there is a fog, whether by day or night, the fog-signals described below shall be carried and used, and shall be sounded at least every five minutes, viz :

(a.) Steamships under way shall use a steam whistle placed before the funnel, not less than eight feet from the deck.

(b.) Sailing ships under way shall use a fog-horn.

(c.) Steamships and sailing ships when not under way shall use a bell.

#### STEERING AND SAILING RULES.

##### *Two Sailing Ships Meeting.*

ART. 11. If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

##### *Two Sailing Ships Crossing.*

ART. 12. When two sailing ships are crossing, so as to involve the risk of collision, then, if they have the wind on different sides, the ship with wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled and the other ship free, in which case the latter ship shall keep out of the way. But if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.

##### *Two Ships Under Steam Meeting.*

ART. 13. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port so that each may pass on the port side of the other.

##### *Two Ships Under Steam Crossing.*

ART. 14. If two ships under steam are crossing, so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

##### *Sailing Ship and Ship Under Steam.*

ART. 15. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

##### *Ships Under Steam to Slacken Speed.*

ART. 16. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at a moderate speed.

##### *Vessels Overtaking Other Vessels.*

ART. 17. Every vessel overtaking any other vessel shall keep out of the way of the said last mentioned vessel.

##### *Construction of Articles 12, 14, 15 and 17.*

ART. 18. Where, by the above rules, one of two ships is to keep out of the way the other shall keep her course, subject to the qualifications contained in the following article:

##### *Proviso to Save Special Cases.*

ART. 19. In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger.

##### *No Ship, under any Circumstances, to Neglect Proper Precautions.*

ART. 20. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

## CHAPTER III.

## PRODUCTS OF THE MIND.

## SECTION 980. How far the subject of ownership.

981. Joint authorship.

982. Transfer.

983. Effect of publication.

984. Subsequent inventor, author, etc.

985. Private writings.

How far the  
subject of  
ownership.

SEC. 980. The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession.

N. Y. C. C., Sec. 429.

Joint  
authorship.

SEC. 981. Unless otherwise agreed, a product of the mind, in the production of which several persons are jointly concerned, is owned by them as follows:

1. If the product is single, in equal proportions.
2. If it is not single, in proportion to the contribution of each.

N. Y. C. C., Sec. 430.

Transfer.

SEC. 982. The owner of any product of the mind, or of any representation or expression thereof, may transfer his property in the same.

N. Y. C. C., Sec. 431.

Effect of  
publication.

SEC. 983. If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this State is concerned.

The protection afforded by Act of Congress is a matter of Federal legislation, with which the State cannot interfere.

N. Y. C. C., Sec. 432.

Subsequent  
inventor,  
author, etc.

SEC. 984. If the owner of a product of the mind does not make it public, any other person subsequently and originally producing the same thing has the same right therein as the prior author, which is exclusive to the

same extent against all persons except the prior author, or those claiming under him.

N. Y. C. C., Sec. 433.

SEC. 985. Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law. Private writings.

N. Y. C. C., Sec. 434.

## CHAPTER IV.

### OTHER KINDS OF PERSONAL PROPERTY.

SECTION 991. Trade marks and signs.

992. Good will of business.

993. Same.

994. Title deeds.

SEC. 991. One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade mark, any form, symbol or name, which has not been so appropriated by another, to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation or part of a designation, which relates only to the name, quality or description of the thing or business. Trade marks and signs.

N. Y. C. C., Sec. 435.

SEC. 992. The good will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired. Good will of business.

N. Y. C. C., Sec. 436.

SEC. 993. The good will of a business is property, transferable like any other. Same.

N. Y. C. C., Sec. 437.

SEC. 994. Instruments essential to the title of real property, and which are not kept in a public office as a record, pursuant to law, belong to the person in whom, for the time being, such title may be vested, and pass with the title. Title deeds.

N. Y. C. C., Sec. 438.



## PART IV.

### ACQUISITION OF PROPERTY.

#### TITLE I. MODES IN WHICH PROPERTY MAY BE ACQUIRED.

- II. OCCUPANCY.
- III. ACCESSION.
- IV. TRANSFER.
- V. HOMESTEADS.
- VI. WILLS.
- VII. SUCCESSION.
- VIII. MINES.

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#### TITLE I.

##### MODES IN WHICH PROPERTY MAY BE ACQUIRED.

###### SECTION 1000. Property, how acquired.

###### SEC. 1000. Property is acquired by—

- 1. Occupancy.
- 2. Accession.
- 3. Transfer.
- 4. Will; or,
- 5. Succession.

Property,  
how  
acquired.

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#### TITLE II.

##### OCCUPANCY.

###### SECTION 1006. Simple occupancy.

###### 1007. Prescription.

SEC. 1006. Occupancy for any period confers a title sufficient against all except the State and those who have

Simple  
occupancy.

title by prescription, mining rules or customs, accession, transfer, will or succession.

N. Y. C. C., Sec. 440.

NOTE.—“Mining rules or customs” is new.

**Prescription**      SEC. 1007. Occupancy for the period prescribed by the CODE OF CIVIL PROCEDURE as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all.

N. Y. C. C., Sec. 441.

## TITLE III.

### ACCESSION.

#### CHAPTER I. TO REAL PROPERTY.

#### II. TO PERSONAL PROPERTY.

### CHAPTER I.

#### ACCESSION TO REAL PROPERTY.

##### SECTION 1013. Fixtures.

1014. Alluvion.

1015. Sudden removal of bank.

1016. Islands, in navigable streams.

1017. In unnavigable streams.

1018. Islands formed by division of stream.

1019. Abandoned bed of stream.

**Fixtures.**      SEC. 1013. When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land, unless he chooses to require the former to remove it.

N. Y. C. C., Sec. 442.

**Alluvion.**      SEC. 1014. Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

N. Y. C. C., Sec. 443.



Sec. 1015. If a river or stream, navigable or not navigable, carries away, by sudden violence, a considerable and distinguishable part of a bank, and bears it to the opposite bank, or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.

Sudden removal of bank.

N. Y. C. C., Sec. 444.

Sec. 1016. Islands and accumulations of land, formed in the beds of streams which are navigable, belong to the State, if there is no title or prescription to the contrary.

Islands, in navigable streams.

N. Y. C. C., Sec. 445.

Sec. 1017. An island or an accumulation of land, formed in a stream which is not navigable, belongs to the owner of the shore on that side where the island or accumulation is formed, or, if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river.

In unnavigable streams.

N. Y. C. C., Sec. 446.

Sec. 1018. If a stream, navigable or not navigable, in forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore, and thereby forms an island, the island belongs to such owner.

Islands formed by division of stream.

N. Y. C. C., Sec. 447.

Sec. 1019. If a stream, navigable or not navigable, forms a new course, abandoning its ancient bed, the owners of the land newly occupied take, by way of indemnity, the ancient bed abandoned, each in proportion to the land of which he has been deprived.

Abandoned bed of stream.

N. Y. C. C., Sec. 448.

## CHAPTER II.

### ACCESSION TO PERSONAL PROPERTY.

NOTE.—The provisions of this chapter, except Sec. 1031, are similar to those of the Code Napoleon and the Code of Louisiana.

**SECTION 1025. Accession by uniting several things.**

1026. Principal part, what.

1027. Same.

1028. Uniting materials and workmanship.

1029. Inseparable materials.

1030. Materials of several owners.

1031. Wilful trespassers.

1032. Owner may elect between the thing and its value.

1033. Wrong-doer liable in damages.

Accession by  
uniting sev-  
eral things.

**SEC. 1025.** When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part; who must, however, reimburse the value of the residue to the other owner or surrender the whole to him.

N. Y. C. C., Sec. 449.

Principal  
part, what.

**SEC. 1026.** That part is to be deemed the principal to which the other has been united only for the use, ornament or completion of the former, unless the latter is the more valuable, and has been united without the knowledge of its owner, who may, in the latter case, require it to be separated and returned to him, although some injury should result to the thing to which it has been united.

N. Y. C. C., Sec. 450.

Same.

**SEC. 1027.** If neither part can be considered the principal, within the rule prescribed by the last section, the more valuable, or, if the values are nearly equal, the more considerable in bulk, is to be deemed the principal part.

N. Y. C. C., Sec. 451.

Uniting  
materials  
and work-  
manship.

**SEC. 1028.** If one makes a thing from materials belonging to another, the latter may claim the thing on reimbursing the value of the workmanship, unless the value of the workmanship exceeds the value of the materials, in which case the thing belongs to the maker, on reimbursing the value of the materials.

N. Y. C. C., Sec. 452.

Inseparable  
materials.

**SEC. 1029.** Where one has made use of materials which in part belong to him and in part to another, in order to form a thing of a new description, without having destroyed any of the materials, but in such a way that they

cannot be separated without inconvenience, the thing formed is common to both proprietors; in proportion, as respects the one, of the materials belonging to him, and as respects the other, of the materials belonging to him and the price of his workmanship.

N. Y. C. C., Sec. 453.

SEC. 1030. When a thing has been formed by the admixture of several materials of different owners, and neither can be considered the principal substance, an owner, without whose consent the admixture was made, may require a separation, if the materials can be separated without inconvenience. If they cannot be thus separated, the owners acquire the thing in common, in proportion to the quantity, quality and value of their materials; but if the materials of one were far superior to those of the others, both in quantity and value, he may claim the thing on reimbursing to the others the value of their materials.

Materials of  
several  
owners.

N. Y. C. C., Sec. 454.

SEC. 1031. The foregoing sections of this article are not applicable to cases in which one wilfully uses the materials of another without his consent; but, in such cases, the product belongs to the owner of the material, if its identity can be traced.

Wilful  
trespassers.

N. Y. C. C., Sec. 455.

SEC. 1032. In all cases where one whose material has been used without his knowledge, in order to form a product of a different description, can claim an interest in such product, he has an option to demand either restitution of his material, in kind, in the same quantity, weight, measure and quality, or the value thereof; or where he is entitled to the product, the value thereof in place of the product.

Owner may  
elect be-  
tween the  
thing and  
its value.

N. Y. C. C., Sec. 456.

SEC. 1033. One who wrongfully employs materials belonging to another, is liable to him in damages, as well as under the foregoing provisions of this chapter.

Wrong-doer  
liable in  
damages.

N. Y. C. C., Sec. 457.

## TITLE IV.

## TRANSFER.

## CHAPTER I. TRANSFER IN GENERAL.

## II. TRANSFER OF REAL PROPERTY.

## III. TRANSFER OF PERSONAL PROPERTY.

## IV. RECORDING TRANSFERS OF REAL PROPERTY.

## V. UNLAWFUL TRANSFERS.

NOTE.—The obligations of the parties to a transfer for consideration, or to a contract of hiring, are regulated by the Titles on *Sales*, on *Exchange* and on *Hiring*. Transfers in trust for the benefit of creditors are regulated by the Part on *Debtor and Creditor*.

## CHAPTER I.

## TRANSFERS IN GENERAL.

## ARTICLE I. DEFINITION OF TRANSFER.

## II. WHAT MAY BE TRANSFERRED.

## III. MEANS OF TRANSFER.

## IV. INTERPRETATION OF GRANTS.

## V. EFFECT OF TRANSFER.

## ARTICLE I.

## DEFINITION OF TRANSFER.

## SECTION 1039. Transfer, what.

## 1040. Voluntary transfer.

Transfer,  
what.

SEC. 1039. Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one person to another.

N. Y. C. C., Sec. 458.

Voluntary  
transfer.

SEC. 1040. A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general; except that a consideration is not necessary to its validity.

N. Y. C. C., Sec. 459.

## ARTICLE II.

## WHAT MAY BE TRANSFERRED.

SECTION 1044. What may be transferred.

1045. Possibility.

1046. Right of re-entry can be transferred.

1047. Owner ousted of possession may transfer.

SEC. 1044. Property of any kind may be transferred, except as otherwise provided by this article.

What may  
be trans-  
ferred.

N. Y. C. C., Sec. 460.

SEC. 1045. A mere possibility, not coupled with an interest, cannot be transferred.

Possibility.

N. Y. C. C., Sec. 461.

SEC. 1046. A right of re-entry, or of repossession for breach of condition subsequent, can be transferred.

Right of re-  
entry can be  
transferred.

[New section.]

NOTE.—This reverses the rule in Sec. 462 (N. Y. C. C.). It harmonizes analogically with the following section, which is based on our statute.

SEC. 1047. The owner of real property in the adverse possession of another, may transfer it with the same effect as if in actual possession.

Owner  
ousted of  
possession  
may transfer

[New section.]

"Conveyances," Sec. 34.

## ARTICLE III.

## MEANS OF TRANSFER.

SECTION 1051. When oral.

1052. Grant, what.

1053. Term "grant" includes what.

1054. Delivery necessary.

1055. Date.

1056. Delivery to grantee is necessarily absolute.

1057. Grant made on condition subsequent.

1058. Instrument to pass an estate on condition precedent only an executory contract.

1059. Delivery in escrow.

1060. Surrendering or cancelling grant does not reconvey.

1061. Constructive delivery.

SEC. 1051. A transfer may be made without writing, in every case in which a writing is not expressly required by statute.

When oral.

N. Y. C. C., Sec. 464.

Grant, what. **SEC. 1052.** A transfer in writing is called a grant.  
N. Y. C. C., Sec. 464.

Term  
"grant" in-  
cludes what. **SEC. 1053.** Every instrument of writing by which property is transferred, whether called a deed, conveyance, bill of sale or grant, means a "grant," as used in this Title.

Delivery  
necessary. **SEC. 1054.** A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor.

N. Y. C. C., Sec. 465; *Hastings vs. Vaughan*, 5 Cal., 315; *Bar vs. Schroeder*, 32 Cal., 610. As to delivery, see cases cited to the next section; also, Sec. 1059, on "Escrows."

Date. **SEC. 1055.** A grant duly executed is presumed to have been delivered at its date.

N. Y. C. C., Sec. 466; *Bagley vs. McMickle*, 9 Cal., 439; *Bensley vs. Atwill*, 12 Cal., 231; *Bar vs. Schroeder*, 32 Cal., 610; *Fitch vs. Bunch*, 30 Cal., 208.

Delivery to  
grantee is  
necessarily  
absolute. **SEC. 1056.** A grant cannot be delivered to the grantee conditionally. Delivery to him or to his agent as such is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.

N. Y. C. C., Sec. 467.

Grant made  
on condition  
subsequent. **SEC. 1057.** Where a grant is made upon condition subsequent, and is subsequently defeated by the non-performance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant, duly acknowledged for record.

[New section.] **NORM.**—This section is intended to secure record evidence of title to the grantor, as fully as he had it before the making of the grant.

Instrument  
to pass an  
estate on  
condition  
precedent  
only an  
executory  
contract. **SEC. 1058.** An instrument purporting to be a grant of real property, to take effect upon condition precedent, does not pass the estate upon the performance of the condition. Such instrument is an executory contract for the conveyance of the property. Upon the performance of the condition, the grantee is entitled to a grant from the

grantor or his successors, for the property, duly acknowledged for record.

[New section.]      *Mesick vs. Sunderland*, 6 Cal., 297; *Brannan vs. Mesick*, 10 Cal., 95.

**NOTE.**—This is intended to hold back the estate in fee simple until its vesting can be authenticated in a manner entitling it to record, furnishing the means and a motive to the grantee to secure the highest evidence of his title, *for record*, rather than leave it dependent upon a fact or act required to be strictly performed, and liable at any time to be disputed.

**SEC. 1059.** A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depository, it will take effect. In the possession of the third person, with the condition, it is called an escrow.

Delivery in escrow.

*N. Y. C. C.*, Sec. 468; *Beem vs. McKusick*, 10 Cal., 538; *Fitch vs. Bunch*, 30 Cal., 208; *Byron vs. Bradshaw*, 23 Cal., 528.

**NOTE.**—The last clause is new.

**SEC. 1060.** Redelivering a grant of real property to the grantor, or cancelling it, does not operate to retransfer the title.

Surrendering or cancelling grant does not reconvey.

*N. Y. C. C.*, Sec. 469; *Snodgrass vs. Picketts*, 13 Cal., 359; *Kearns vs. Killian*, 18 Cal., 491; *Bowman vs. Cadworth*, 31 Cal., 148; *Killy vs. Willson*, 33 Cal., 691; *Lawton vs. Gordon*, 34 Cal., 36; *Byron vs. Bradshaw*, 23 Cal., 528.

**SEC. 1061.** Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

Constructive delivery.

1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or,

2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown or may be presumed.

*N. Y. C. C.*, Sec. 470; *Hastings vs. Vaughan*, 5 Cal., 315.

## ARTICLE IV.

## INTERPRETATION OF GRANTS.

## SECTION 1065. Grants, how interpreted.

1066. Construction of instruments.

1067. Limitations, how controlled.

1068. Recitals, when resorted to.

1069. If language ambiguous, what may be considered.

1070. Interpretation against grantor.

1071. Grant, how construed.

1072. Irreconcilable provisions.

1073. Thing granted must be described.

1074. Words "northerly," "southerly," etc., mean what.

1075. Meaning of "heirs" and "issue," in certain remainders.

1076. Words of inheritance unnecessary.

1077. When fee simple title is presumed to pass.

1078. Subsequently acquired title passes by operation of law.

Grants, how  
interpreted.

SEC. 1065. Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this article.

N. Y. C. C., Sec. 472.

Construction  
of instru-  
ments.

SEC. 1066. The interpretation consists in ascertaining, from the language of the instrument, the understanding and intention of the parties at the time of contracting.

[New section.] Brannan vs. Mesick, 10 Cal., 95.

Limitations,  
how con-  
trolled.

SEC. 1067. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.

N. Y. C. C., Sec. 473.

Recitals,  
when  
resorted to.

SEC. 1068. If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction.

N. Y. C. C., Sec. 474.

If language  
ambiguous,  
what may be  
considered.

SEC. 1069. Parol testimony may be heard to explain latent ambiguities. In such cases, the state of the country, the state of the thing granted, the circumstances attendant upon the transaction, the particular situation of the parties and their acts concerning the property under or subsequent to the grant, may be considered for the purpose of ascertaining the intention.

[New section.] United States vs. Appleton, 1 Sumner, 502; Mulford vs. Le France, 26 Cal., 89; Brannan vs. Mesick, 10 Cal., 95.



**Sec. 1070.** A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.

Interpretation against grantor.

N. Y. C. C., Sec. 475; *Muller vs. Boggs*, 25 Cal., 175; *Dodge vs. Walley*, 22 Cal., 224; *Vance vs. Fore*, 24 Cal., 435.

**Sec. 1071.** A grant must be interpreted, if possible, to give consistent effect to each word and part.

Grant, how construed.

[New section.] *Aarens vs. Dale*, 18 Cal., 359; *Brannan vs. Mesick*, 10 Cal., 95.

**Sec. 1072** If several parts of a grant are absolutely irreconcilable, the former part prevails.

Irreconcilable provisions.

N. Y. C. C., Sec. 476; *Havens vs. Dale*, 18 Cal., 359.

**Sec. 1073.** The thing granted must be described so as to be capable of identification.

Thing granted must be described.

[New section.] *Lick vs. O'Donnell*, 3 Cal., 59; *Stanley vs. Green*, 12 Cal., 148; *Schenk vs. Evay*, 24 Cal., 104; *Cadwell vs. Center*, 30 Cal., 539; *Reamer vs. Nesmith*, 34 Cal., 624; *Reed vs. Spier*, 27 Cal., 57; *Vance vs. Fore*, 24 Cal., 435; *Kimball vs. Temple*, 25 Cal., 440.

**Sec. 1074.** The words "northerly," "southerly," "easterly," "westerly," when used in description of land, mean due north, due south, due east, due west, respectively, unless controlled by other words, or by lines, monuments or natural objects.

Words "northerly," "southerly," etc., mean what.

[New section.] *Bosworth vs. Dantiew*, 25 Cal., 296; *Fratt vs. Wood*, 32 Cal., 219; *Colton vs. Seavey*, 22 Cal., 496.

**Sec. 1075.** Where a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors or issue living at the death of the person named as ancestor.

Meaning of "heirs" and "issue," in certain remainders.

N. Y. C. C., Sec. 477; *Stats. 1855*, 171, Sec. 2.

**Sec. 1076.** Words of inheritance or succession are not requisite to transfer a fee in real property.

Words of inheritance unnecessary.

N. Y. C. C., Sec. 478; *Stats. 1855*, 171, Sec. 3.

**Sec. 1077.** A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended.

When fee simple title is presumed to pass.

[New section.]

Subsequently acquired title passes by operation of law.

SEC. 1078. Where a person purports, by proper instrument, to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors.

"Conveyances," Sec. 33.

## ARTICLE V.

### EFFECT OF TRANSFER.

SECTION 1082. What title passes.

1083. What interests affected.

1084. Incidents.

1085. Grant may inure to benefit of stranger.

What title passes.

SEC. 1082. A transfer vests in the transferee all the actual title to the thing transferred which the transferrer then has, unless a different intention is expressed or is necessarily implied, and no more, except in the cases specified in Secs. 1083, 1142, —, —.

N. Y. C. C., Sec. 479.

NOTE.—The blank sections correspond to Secs. 1745 and 1773 of the New York Civil Code.

What interests affected.

SEC. 1083. A transfer cannot affect any interest of the transferrer which he does not own when it is made; but, if it is made with a covenant, neither the transferrer nor any person claiming under him can be permitted to take in contravention of the covenant.

N. Y. C. C., Sec. 480; "Conveyances," Sec. 33.

Incidents.

SEC. 1084. The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself.

N. Y. C. C., Sec. 481.

Grant may inure to benefit of stranger.

SEC. 1085. A present interest, and the benefit of a condition or covenant respecting property, may be taken by any natural person under a grant, although not named a party thereto.

N. Y. C. C., Sec. 482.

## CHAPTER II.

## TRANSFER OF REAL PROPERTY.

## ARTICLE I. MODE OF TRANSFER.

## II. FORM AND EFFECT OF TRANSFER—CODE COVENANTS.

## ARTICLE I.

## MODE OF TRANSFER.

SECTION 1091. Requisites for transfer of real property.

1092. Written instruments, what are.

1093. Grant by married woman, how acknowledged.

1094. Power of attorney of married woman, how acknowledged.

1095. Attorney in fact, how must execute for principal.

1096. Distinction between sealed and unsealed instruments abolished. Import consideration.

1097. Want of consideration, *onus probandi*, where lies.

1098. Witness to an instrument not necessary to its validity.

SEC. 1091. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred or affected only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent, thereunto authorized by writing.

Requisites  
for transfer  
of real  
property.

N. Y. C. C., Sec. 483; "Fraudulent Conveyances and Contracts," Sec. 6.

NOTE.—"Thereunto authorized by writing," is an addition to our statute of "Conveyances" (Sec. 1), but is required by Sec. 6, "Fraudulent Conveyances," and by *Videau vs. Griffin*, 21 Cal., 389.

A transfer of real property is called a grant. At first it seemed of doubtful propriety to change from "deed" to "grant." Either word is legally sufficient. The ear is more accustomed to "deed" or "conveyance," though "grant" is familiar to common law lawyers. The New York revisers adopt "grant." Considering its *derivatives*, it is great economy in time and space—"grantor" and "grantee"—which can be so often used in a conveyance in place of "party of the first part" and "party of the second part" (see form of grant). These, we think, are sufficient reasons for the change from "deed" to "grant." Besides, "deed" more especially implies a *seal*, which has been abolished.

SEC. 1092. Written instruments, by which real property is transferred or affected, are called Real Instruments, and are—

Written  
instruments,  
what are.

1. A grant.
2. A power of attorney, authorizing the execution of a real instrument.
3. A revocation of power of attorney authorizing the execution of a real instrument.
4. An executory contract, for sale and purchase of real property.
5. An instrument creating or declaring trusts.
6. An instrument granting or reserving a power.
7. An instrument granting an easement or servitude.
8. A lease for a term of more than one year.
9. A marriage settlement contract.

[New section.]

**NOTE.**—Subd. 1 is based on "Conveyances," Secs. 1, 24; Subd. 2, on Sec. 27; Subd. 3, on Sec. 28; Subd. 4, on Sec. —; Subd. 7, on N. Y. C. C., Sec. 530; Subd. 8, on "Fraudulent Conveyances," Sec. 6; Subd. 9, on "Husband and Wife," Sec. 16. Mortgages, liens, etc., will be treated under their appropriate Title and declared subject to the recording laws. The standard is fixed by these sections, and other subjects will be referred to it to determine requirements and effects.

We have grouped all instruments affecting title, and called them "Real Instruments," as a matter of convenience in referring to all the instruments as a class. To call an assignment of mortgages a lease, and an executory contract conveyances, and their holders *purchasers*, by legislative definition ("Conveyances," Sec. 36), is simply a barbarous perversion of the words "conveyances" and "purchasers." It will require an amendment of Sec. 36, "Conveyances," to let in executory contracts as "conveyances," as their recording has been authorized since the passage of the Act concerning conveyances.

(Grant by married woman, how acknowledged.

**SEC. 1093.** No estate in the real property of a married woman passes or is affected by any grant or instrument purporting to be executed or acknowledged by her, unless the grant or instrument is acknowledged by her in the manner prescribed by Secs. 1179 and 1180.

[New section.]

N. Y. C. C., Sec. 486; "Husband and Wife," Sec. 6; "Conveyances," Secs. 19-23 (inclusive); *Morris vs. Wilson*, 13 Cal., 494; *Landers vs. Bolton*, 28 Cal., 393.

Power of attorney of married woman, how acknowledged.

**SEC. 1094.** A power of attorney of a married woman, authorizing the execution of an instrument affecting her real property, has no validity for that purpose until ac-

known by her in the manner provided in Secs. 1179 and 1180.

[New section.] Stats. 1863, 165. General references to the subject: Mott vs. Smith, 16 Cal., 533; Dentsel vs. Waldie, 30 Cal., 138; Dow vs. Gould and Curry S. M. Co., 31 Cal., 629; Raccoulat vs. Sansevain, 32 Cal., 376.

**SEC. 1095.** When an attorney in fact executes an instrument affecting real property, he must subscribe the name of his principal to it, and his own name as attorney in fact.

Attorney in fact, how must execute for principal.

[New section.] Fisher vs. Salmon, 1 Cal., 413; Salmon vs. Hoffman, 2 Cal., 138; Videau vs. Griffin, 21 Cal., 389; Dupont vs. Wertheman, 10 Cal., 354; Hunter vs. Watson, 12 Cal., 363; Morrison vs. Bowman, 29 Cal., 337.

**SEC. 1096.** Private seals are not required for any purpose. All distinctions between sealed and unsealed instruments are abolished. A written instrument prima facie imports a consideration.

Distinction between sealed and unsealed instruments abolished. Import consideration.

[New section.] NOTE.—A serious, but desirable, innovation. The bar fully understand the subject. No time or space will be employed in elaborating the reasons.

**SEC. 1097.** The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.

Want of consideration, onus probandi, where lies.

[New section.]

**SEC. 1098.** A witness to any instrument mentioned in Sec. 1092 is not necessary to its validity. Such witness is necessary only as a means of proving the instrument for record under Sec. 1187.

Witness to an instrument not necessary to its validity.

[New section.] NOTE.—It distinctly expresses what may be implied from other sections. Substitute for the following (Sec. 484), from the New York Civil Code (the proof and effect of non-recording are provided for in other sections): "A grant of an estate in real property, other than an estate for years or at will, must be sealed by the grantor or his agent; and if not duly acknowledged, previous to its delivery, according to the provisions of Chap. IV of this Title, its subscription and seal must be attested by at least one witness; or, if not so attested, it has no effect as against a subsequent purchaser or encumbrancer, or those claiming under him, until so acknowledged."

## ARTICLE II.

## FORM AND EFFECT OF TRANSFER—CODE COVENANTS.

## SECTION 1102. Form of simple grant.

- 1103. No implied covenants in grants.
- 1104. Code Covenants, special and general.
- 1105. Special Code Covenants, what.
- 1106. General Code Covenants, what.
- 1107. Form of grant, with Special Code Covenants.
- 1108. Form of grant, with General Code Covenants.
- 1109. Construction of Code Covenants.
- 1110. Covenant "against prior grants made by the grantor," what.
- 1111. Covenant "against encumbrances imposed or suffered by the grantor," what.
- 1112. Covenant "of ownership," what.
- 1113. Covenant "against encumbrances," what.
- 1114. "Encumbrances" defined.
- 1115. Grantee not barred from obtaining rescission of grant, or damages for false representations.
- 1116. Code Covenants personal covenants.
- 1117. Damages for breach of certain Code Covenants, how determined.
- 1118. Damages for breach of certain other Code Covenants, how determined.
- 1119. Liabilities on other than Code Covenants depend upon what.
- 1120. What passes by grant.
- 1121. A fee simple title presumed, when.
- 1122. Any title subsequently acquired by grantor passes to grantee when.
- 1123. Grant, how far conclusive on purchasers.
- 1124. Conveyances by owner for life or for years.
- 1125. Title to highway.
- 1126. Attornment by tenant, when unnecessary. Liabilities of tenant.
- 1127. Lineal and collateral warranties.
- 1128. Attornment to a stranger.
- 1129. What easements pass with property.

Form of  
simple grant

SEC. 1102. A grant of real property may be made in substance as follows:

This grant, made the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, by A. B., of \_\_\_\_\_, grantor, to C. D., of \_\_\_\_\_, grantee, witnesseth:

That the grantor grants to the grantee all the real property situated in \_\_\_\_\_, bounded and described as follows:

Witnessed by:  
E\_\_\_\_\_ F\_\_\_\_\_.

Executed by:  
A\_\_\_\_\_ B\_\_\_\_\_.

NOTE.—The following is Sec. 485 of the New York Civil Code, containing the form of grant:

"A grant of an estate in real property may be made in substance as follows:

"This grant, made the — day of —, in the year —, between A. B., of —, of the first part, and C. D., of —, of the second part, witnesseth :

"That the party of the first part hereby grants to the party of the second part, in consideration of — dollars, now received, all the real property situated in —, and bounded —.

"Witness the hand and seal of the party of the first part.  
"A. B. [Seal]."

In England, the following form is prescribed by 8 and 9 Vic., Chap. 119 :

"This indenture, made, etc., in pursuance of an Act to facilitate the conveyance of real property, between A. B. and C. D., witnesseth: That, in consideration of —, now paid by the said C. D. to the said A. B. (the receipt whereof is hereby by him acknowledged), he, the said A. B., doth grant unto the said C. D., his heirs and assigns, forever, all that —.

"In witness whereof, the said parties hereto have hereunto set their hands and seals."

Chancellor Kent (4 Com., 461) recommends the following :

"I, A. B., in consideration of one dollar to me paid by C. D., grant to him the lot of land [describing it].

"Witness my hand and seal," etc.

A form briefer still was held sufficient in Kentucky (Chiles vs. Conley, 2 Dana, 23).

**SEC. 1103.** No covenant is implied in any grant of an estate in real property, whether it contains express covenants or not, except as provided by the Title on *Hiring*.

No implied covenants in grants.

N. Y. C. C., Sec. 489.

**SEC. 1104.** There are four express covenants, known as Code Covenants, pertaining to grants, and distinguished as Special Code Covenants and General Code Covenants.

Code Covenants, special and general.

[New section.]

**SEC. 1105.** Special Code Covenants are—

Special Code Covenants, what.

1. Against prior grants made by the grantor.

2. Against encumbrances imposed or suffered by the grantor.

[New section.] **NOTE.**—Supplementary to Act concerning conveyances. (Stats. 1855, 171, Sec. 9.)

**SEC. 1106.** General Code Covenants are—

General Code Covenants, what

1. Of ownership

2. Against encumbrances.

[New section.] **NOTE.**—See note to Sec. 1112.

**SEC. 1107.** A grant of an estate in real property, with the Special Code Covenants, may be made in substance as follows :

Form of grant, with Special Code Covenants.

This grant, made the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, by A. B., of \_\_\_\_\_, grantor, to C. D., of \_\_\_\_\_, grantee, witnesseth :

That the grantor grants to the grantee all the real property situated \_\_\_\_\_, bounded and described as follows :

This grant carries with it the following Special Code Covenants :

1. Against prior grants made by the grantor.
2. Against encumbrances imposed or suffered by the grantor.

Witnessed by :

E\_\_\_\_, F\_\_\_\_.

Executed by :

A\_\_\_\_ B\_\_\_\_.

[New section.]

Form of  
grant, with  
General Code  
Covenants.

SEC. 1108. A grant of an estate in real property, with the General Code Covenants, may be made in substance as follows :

This grant, made the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, by A. B., of \_\_\_\_\_, grantor, to C. D., of \_\_\_\_\_, grantee, witnesseth :

That the grantor grants to the grantee all the real property situated \_\_\_\_\_, bounded and described as follows :

This grant carries with it the following General Code Covenants :

1. Of ownership.
2. Against encumbrances.

Witnessed by :

E\_\_\_\_ F\_\_\_\_.

Executed by :

A\_\_\_\_ B\_\_\_\_.

[New section.]

Construction  
of Code  
Covenants.

SEC. 1109. When any Code Covenant is inserted in a grant, by the name and form provided in the two preceding sections, it shall be construed as a covenant, by and on the part of the grantor and his personal representatives, to and with the grantee and his personal representatives, to the effect as provided respectively in the next four sections.

[New section.]

Covenant  
"against  
prior grants  
made by the  
grantor,"  
what.

SEC 1110. A covenant "against prior grants made by the grantor" is a covenant that previous to the delivery of the grant the grantor had not granted the same property, or any right, title or interest therein, to any person other than the grantee.

[New section.]

Based on "Conveyances," Sec. 9—supplementary Act.



**SEC. 1111.** A covenant "against encumbrances imposed or suffered by grantor" is a covenant that the property is, at the time of the delivery of the grant, free from encumbrances made or suffered by the grantor or any person claiming under him.

Covenant "against encumbrances imposed or suffered by the grantor," what.

[New section.] Based on "Conveyances," Sec. 9—supplementary Act.

**SEC. 1112.** A covenant "of ownership" is a covenant that the grantor, at the time of the delivery of the grant, is the owner in fee simple absolute of the property granted, and has peaceable possession of the same, and a perfect, recorded, fee simple title thereto, and will pay all damages arising from want of, or defect in, the possession or title, or recording, and all expenses properly incurred by the covenantor in defending or recovering such possession or title, or in perfecting and recording such title.

Covenant "of ownership," what.

[New section.] **NOTE.**—The whole subject of covenants is substantially embraced in two propositions:

1. That the grantor owns the property in fee simple, and will defend the title.
2. That it is unencumbered.

Our "covenant of ownership" embraces all the material things included in the covenants of "seisin" and "right to convey," which are substantially the same; also, "warranty" and "quiet enjoyment," which are alike, or have only technical distinctions. There is but little difference, as between the four covenants mentioned. Some are *real* and others *personal*. Some are broken *instantly*; others on *eviction*, or acceptance of paramount title. The covenant "of ownership" also embraces "further assurance" in a "perfect, recorded, fee simple title thereto." The Code conveys "subsequently acquired title."

In *McGary vs. Hastings* (30 Cal., 360), the Court holds that a judicial eviction is not necessary to a breach of "warranty." The simple acceptance of *paramount* title is a sufficient breach; hence the distinction between "seisin" and "warranty," or "quiet enjoyment," is practically of no moment.

"Although there must be an eviction, it is not necessary that there should be an actual dispossession of the grantee. If the paramount title is so asserted that he must yield to it or go out, the covenantee may purchase or lease of the true owner, and this will be considered a sufficient eviction to constitute a breach." (*McGary vs. Hastings*, 39 Cal., 367.)

"The right of possession accompanies the ownership, and from the allegation of the fact of ownership—which is the allegation of *seisin* in 'ordinary language'—the right of possession is presumed as a matter of law." (*Payne and Dewey vs. Treadwell*, 16 Cal., 243; *Field, C. J.*)

The New York revisers (N. Y. C. C., Sec. 1844) establish only *one* rule of damage for breach of the four covenants

substantially embraced in our covenant "of ownership." We adopt that rule of damage for a breach of our one covenant "of ownership," by our Sec. —, but vary the relief by Secs. —, —, —, —, making it more elastic to reach the different conditions surrounding the parties; and in this we express what is substantially implied in a civil law transfer. See Title on *Detriment*.

Our Code Covenant "of ownership" is *independent* of the four Common Law Covenants above mentioned. If the former is used, the *Code defines* the liability to meet the requirements of the *present* instead of the *past*.

In order that no alarm may be felt at this apparent substitution of a single covenant for the four Common Law Covenants, we mention here that parties who choose can always avail themselves of the latter covenants, under Sec. 1119.

Covenant  
"against  
encum-  
brances,"  
what.

SEC. 1113. A covenant "against encumbrances" is a covenant that, at the time of the delivery of the grant, the estate granted is clear of all encumbrances.

[New section.]

"Encum-  
brances"  
defined.

SEC. 1114. The term "encumbrances" includes taxes and assessments; also, attachment, judgment and execution liens; also, vendors', mechanics' and mortgage liens; also, all other debts or demands which are liens upon real property.

[New section.]

NOTE.—Provision must be made in the Code of Civil Procedure to file notice in the Recorder's office of the levy of an execution, in order to establish a lien valid against subsequent purchasers in good faith for a valuable consideration.

Grantee not  
barred from  
obtaining  
rescission of  
grant, or  
damages for  
false repre-  
sentations.

SEC. 1115. Accepting a grant, with or without Code or Common Law Covenants, does not bar the grantee from obtaining rescission of the grant, or damages for false and fraudulent representations as to the title, location, quantity, quality and condition of the property granted, or as to the privileges connected with it, the encumbrances upon it, or the rents and profits derived from it.

[New section.]

NOTE.—This section is intended to restore the rule in *Alvares vs. Brannan* (7 Cal., 503), reversed in *Peabody vs. Phelps* (9 Cal., 213), and reversal tolerated by *stare decisis* in *Wright vs. Carrillo* (22 Cal., 595). Attention was called to this point by J. B. Harmon, Esqr. Judge Field, who delivered the opinion in *Peabody vs. Phelps*, expresses his approval of this section. Perhaps this section ought to be placed under the Title on *Rescission*.

**SEC. 1116.** The four Code Covenants mentioned in Sec. 1104 are personal covenants, and do not run with the land. They may be transferred by the covenantee to any subsequent grantee in like manner with any other obligation, but they do not, by implication, pass with a grant.

Code Covenants personal covenants.

[New section.]

**SEC. 1117.** Damages for breach of Code Covenants "against prior grants made by the grantor" and "of ownership," specified in Subd. 1, Sec. 1105, and Subd. 1, Sec. 1106, are determined under the provisions of Secs. —, —, —, — and — (Title on *Detriment*).

Damages for breach of certain Code Covenants, how determined.

[New section.]

**SEC. 1118.** Damages for breach of Code Covenants "against encumbrances imposed or suffered by the grantor" and "against all encumbrances," specified in Subd. 2, Sec. 1105, and Subd. 2, Sec. 1106, are determined under the provisions of Sec. — (Title on *Detriment*).

Damages for breach of certain other Code Covenants, how determined.

**SEC. 1119.** The liabilities on Common Law or other than Code Covenants must depend upon the terms of such covenants, and upon the legal effect given to them by other provisions of this Code, or by the Common Law.

Liabilities on other than Code Covenants depend upon what.

[New section.]

**NORM.—**It is intended by these Code Covenants to provide a more simple arrangement for business men in dealing with real estate. Those who desire to adopt the more intricate Common Law Covenants are left by this section with the broadest latitude. They are retained for the benefit of those who will see no good in the Code Covenants, until they are established by use and the others practically superseded.

**SEC. 1120.** A grant vests in the grantee all the actual title to the thing granted which the grantor then has, unless a different intention is expressed or is necessarily implied, and no more, except in the cases specified in Sec. 1121 and 1122.

What passes by grant.

N. Y. C. C., Sec. 479.

**SEC. 1121.** A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended.

A fee simple title presumed, when

[New section.]

**SEC. 1122.** When a grant of real property is expressed or presumed to be in fee simple, any title subsequently

Any title subsequently acquired by grantor passes to grantee, when.

acquired by the grantor passes, by operation of law, to the grantee or his successors, and no additional grant is necessary. This section does not apply to grants made by Sheriffs or other public officers

[New section,]

Based on "Conveyances," Sec. 33.

NOTE.—The three preceding sections make simple and certain the law as to what kind of a grant will carry subsequently acquired title. Sec. — makes this section, under Title on *Mortgage*, apply to mortgages.

Grant, how far conclusive on purchasers.

SEC. 1123. Every grant of an estate in real property is conclusive against the grantor; also, against every one subsequently claiming under him, except a purchaser or encumbrancer who, in good faith, and for a valuable consideration, acquires a title or lien by an instrument [or proceeding] that is first duly recorded.

N. Y. C. C., Sec. 490.

Conveyances by owner for life or for years.

SEC. 1124. A grant made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer.

N. Y. C. C., Sec. 491.

Title to highway.

SEC. 1125. A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the centre thereof.

N. Y. C. C., Sec. 492.

Attornment by tenant, when unnecessary.

SEC. 1126. When real property is occupied by a tenant, a grant of any estate therein, by his landlord, is valid without an attornment of the tenant to the grantee; but the payment of rent to such grantor, by his tenant, before notice of the grant, is binding upon the grantee; and the tenant is not liable to the grantee for any breach of the condition of the lease, until he has had notice of the grant.

N. Y. C. C., Sec. 493; "Conveyances," Secs. 6, 7.

Lineal and collateral warranties.

SEC. 1127. Lineal and collateral warranties, with all their incidents, and all the incidents of feudal tenures, not expressly retained by this Code, are abolished. The liability of those who acquire the real property of a decedent, by will or succession, is regulated by the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 494; "Conveyances," Sec. 8.

**SEC. 1128.** Attornment to a stranger is void, unless it is with the consent of the landlord, or in consequence of a judgment of a Court of competent jurisdiction.

Attornment to a stranger

"Conveyances," Sec. 7.

**SEC. 1129.** A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent, as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

What easements pass with property.

N. Y. C. C., Sec. 488.

### CHAPTER III.

#### TRANSFERS OF PERSONAL PROPERTY.

##### ARTICLE I. MODE OF TRANSFER.

##### II. WHAT OPERATES AS A TRANSFER.

##### III. GIFTS.

##### ARTICLE I.

##### MODE OF TRANSFER.

**SECTION 1135.** When must be in writing.

1136. Transfer by sale, etc.

**SEC. 1135.** An interest in a ship, or in an existing trust, can be transferred only by operation of law, or by a written instrument, subscribed by the person making the transfer, or by his agent.

When must be in writing

This provision is intended to settle a doubtful question. The uniform language of the authorities is, that a bill of sale is the customary and proper mode of transfer. Agreements for sale are regulated by the Title on Sale.

N. Y. C. C., Sec. 495.

**SEC. 1136.** The mode of transferring other personal property by sale is regulated by the Title on that subject, in Division Third of this Code.

Transfer by sale, etc.

N. Y. C. C., Sec. 496.

## ARTICLE II.

## WHAT OPERATES AS A TRANSFER.

SECTION 1140. Transfer of title under sale.

1141. Transfer of title under executory agreement for sale.

1142. When buyer acquires better title than seller has.

Transfer of  
title under  
sale.

SEC. 1140. The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not.

N. Y. C. C., Sec. 497.

Transfer of  
title under  
executory  
agreement  
for sale.

SEC. 1141. Title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery and offered it to the buyer, with intent to transfer the title thereto, in the manner prescribed by the chapter upon *Offer of Performance*.

N. Y. C. C., Sec. 498.

When buyer  
acquires  
better title  
than seller  
has.

SEC. 1142. Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind and does rescind the transfer made by him.

N. Y. C. C., Sec. 499.

## ARTICLE III.

## GIFTS.

SECTION 1146. Gifts defined.

1147. Gift, how made.

1148. Gift not revocable.

1149. Gift in view of death, what.

1150. When gift presumed to be in view of death.

1151. Revocation of gift in view of death.

1152. Effect of will upon gift.

1153. When treated as legacy.

Gifts defined

SEC. 1146. A gift is a transfer of personal property, made voluntarily and without consideration.

N. Y. C. C., Sec. 500.

**SEC. 1147.** A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.

Gift, how made.

N. Y. C. C., Sec. 501.

**SEC. 1148.** A gift, other than a gift in view of death, cannot be revoked by the giver.

Gift not revocable.

N. Y. C. C., Sec. 502.

**SEC. 1149.** A gift in view of death is one which is made in contemplation, fear or peril of death, and with intent that it shall take effect only in case of the death of the giver.

Gift in view of death, what.

N. Y. C. C., Sec. 503.

**SEC. 1150.** A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death.

When gift presumed to be in view of death.

N. Y. C. C., Sec. 504.

**SEC. 1151.** A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness, or escape from the peril, under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time.

Revocation of gift in view of death

N. Y. C. C., Sec. 505.

**SEC. 1152.** A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift.

Effect of will upon gift.

N. Y. C. C., Sec. 506.

**SEC. 1153.** A gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver.

When treated as legacy.

N. Y. C. C., Sec. 507.

## CHAPTER IV.

### RECORDING TRANSFERS OF REAL PROPERTY.

#### ARTICLE I. WHAT MAY BE RECORDED.

#### II. PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS.

#### III. EFFECT OF RECORDING, OR THE WANT THEREOF.

#### IV. MODE OF RECORDING.

## ARTICLE I.

## WHAT MAY BE RECORDED.

SECTION 1159. Letters patent may be recorded without acknowledgment.

Effect of recording.

1160. What kind of instruments may be recorded.

1161. Instruments evidencing title declared by judgment, recorded.

1162. What shall not be recorded.

1163. Instruments proved by other than subscribing witnesses, when and how recorded.

1164. Instruments executed under power of attorney, when deemed recorded.

1165. Powers of attorney, how revoked.

Letters patent may be recorded without acknowledgment.

Effect of recording.

SEC. 1159. Letters patent from the United States or from the State of California, duly executed and authenticated pursuant to existing law, granting real property in this State, may be recorded without acknowledgment or further proof. Such recording shall have like effect as the recording of instruments mentioned in the next section.

[New section.] "Conveyances," Sec. 18.

What kind of instruments may be recorded.

SEC. 1160. Real instruments mentioned in Sec. 1092 may be recorded when acknowledged, or proved and certified as provided in this chapter.

[New section.] For construction of registration laws generally, see: Woodworth vs. Gutzman, 1 Cal., 203; Call vs. Hastings, 3 Cal., 179; Mesick vs. Sunderland, 6 Cal., 279; Dennis vs. Burnett, 6 Cal., 670; Bird vs. Denison, 7 Cal., 297; Chamberlain vs. Bell, 7 Cal., 292; Hunter vs. Mason, 12 Cal., 363; Pixley vs. Huggins, 15 Cal., 127; Smith vs. Dall, 13 Cal., 510; Jones vs. Martin, 16 Cal., 165; McCabe vs. Grey, 20 Cal., 509; Wallace vs. Moody, 26 Cal., 387; Fogarty vs. Sawyer, 23 Cal., 570; Page vs. Rogers, 31 Cal., 293.

Instruments evidencing title declared by judgment, recorded.

SEC. 1161. In judgments of partition, and in judgments determining title to real property, the Court, at the time of rendering judgment, or at any time thereafter, may require the respective parties, or a Commissioner, to make and acknowledge such grant, for record, as will enable them to have recorded, in the land records, the evidence of their respective titles, as shown by the judgments.

[New section.]

What shall not be recorded.

SEC. 1162. Instruments not acknowledged, or proved and certified as required by this chapter, and instruments



not authorized by law to be recorded, shall not be transcribed into the books of record. If so transcribed, the transcription does not impart notice, or have any legal effect.

[New section.] *Raccoullat vs. Sansevain*, 32 Cal., 376, 450; *Minn vs. O'Connor*, 27 Cal., 238; *Smith vs. Brannan*, 13 Cal., 107; *Hastings vs. Vaughan*, 5 Cal., 305; *Mesick vs. Sunderland*, 6 Cal., 297; *Wolf vs. Fogarty*, 6 Cal., 224.

NOTE.—The first clause of this section establishes a positive duty, for the violation of which the Recorder is liable to punishment under provisions in the Penal Code. The last clause *expresses* what arises from *implication* under the preceding section, as established by numerous adjudications. It is deemed best to give clear expression to the law guarding the public records against unauthorized registration.

SEC. 1163. An instrument proved by other than subscribing witnesses, and certified pursuant to Sec. 1189, may be recorded in the proper office, if the original is at the same time deposited therein to remain for public inspection, but not otherwise.

Instruments proved by other than subscribing witnesses, when and how recorded.

N. Y. C. C., Sec. 510; "Conveyances," Sec. 10.

SEC. 1164. An instrument executed by an attorney in fact, and filed for record, or transcribed into the proper books of record, shall not be deemed recorded until the power of attorney authorizing the execution of the instrument is also recorded in the same office. They are deemed one instrument, though they may be recorded at different times.

Instruments executed under power of attorney, when deemed recorded.

[New section.]

SEC. 1165. No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded in the same office in which the instrument containing the power was recorded.

Powers of attorney, how revoked

[New section.] "Conveyances," Sec. 28; N. Y. C. C., Sec. 552.

## ARTICLE II.

## PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS.

- SECTION 1169.** By whom acknowledgments may be taken in this State.
1170. Same.
1171. By whom taken without the State.
1172. By whom taken without the United States.
1173. Deputy can take acknowledgment.
1174. Requisites for acknowledgments.
1175. Officer must indorse certificate.
1176. Form of certificate.
1177. Attorney in fact must exhibit to officer, what.
1178. Form of certificate when acknowledgment is by attorney in fact.
1179. Acknowledgment by married woman.
1180. Form of certificate when acknowledgment is by married woman.
1181. Conveyance by married woman, effect of.
1182. Interpreter may be employed.
1183. Proof of execution, how made.
1184. Witness must be personally known to officer.
1185. Witness shall prove, what.
1186. Certificate of officer shall be indorsed thereon, setting forth what.
1187. Handwriting may be proved, when.
1188. Evidence must prove, what.
1189. Certificate of officer.
1190. Officers authorized to do certain things.
1191. Officers must affix their signatures.
1192. When instrument is improperly certified, party may have action to correct error.
1193. In certain cases, parties interested entitled to action in Court to obtain judgment of proof of an instrument for record.
1194. Conveyances heretofore made to be governed by then existing laws.
1195. Recording, and as evidence, to be governed by then existing laws.
1196. Statutes curing acknowledgments, etc., preserved.

By whom  
acknowledg-  
ments may  
be taken in  
this State.

**SEC. 1169.** The proof or acknowledgment of an instrument may be made at any place within this State, before a Justice or Clerk of the Supreme Court.

N. Y. C. C., Sec. 516; "Conveyances," Sec. 4.

Same.

**SEC. 1170.** The proof or acknowledgment of an instrument may be made, in this State, within the city, county or district for which the officer was elected or appointed, before either—

1. A Judge or Clerk of a Court of record; or,
2. A Mayor or Recorder of a city; or,

- 3. A Justice of the Peace; or,
- 4. A County Recorder; or,
- 5. A Notary Public.

N. Y. C. C., Sec. 517; "Conveyances," Sec. 4; Hopkins vs. Delaney, 8 Cal., 85; Ingoldsby vs. Juan, 12 Cal., 564; Muller vs. Boggs, 25 Cal., 175; Kimball vs. Semple, 25 Cal., 440.

SEC. 1171. The proof or acknowledgment of an instrument may be made without this State, but within the United States, and within the jurisdiction of the officer, before either—

By whom  
taken with-  
out the State

- 1. A Judge or Clerk of any Court of record of the United States; or,
- 2. A Judge or Clerk of any Court of record of any State or Territory; or,
- 3. A Commissioner appointed by the Governor of this State for that purpose, pursuant to special statutes; or,
- 4. A Notary Public.

N. Y. C. C., Sec. 518; "Conveyances," Sec. 4; Lord vs. Sherman, 2 Cal., 498.

SEC. 1172. The proof or acknowledgment of an instrument may be made without the United States, before either—

By whom  
taken with-  
out the  
United  
States.

- 1. A Minister Plenipotentiary, or Minister Extraordinary, or *Chargé d'Affaires* of the United States, resident and accredited in the country where the proof or acknowledgment is made; or,
- 2. A Consul or Vice Consul of the United States, resident in that country; or,
- 3. A Judge of a Court of record of the country where the proof or acknowledgment is made; or,
- 4. Commissioners appointed for such purposes by the Governor of the State, pursuant to special statutes; or,
- 5. A Notary Public.

N. Y. C. C., Sec. 519; "Conveyances," Sec. 4; Mott vs. Smith, 16 Cal., 533; McMinn vs. O'Connor, 27 Cal., 238.

SEC. 1173. When any of the officers mentioned in the four preceding sections are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy, in the name of his principal.

Deputy can  
take  
acknowledg-  
ment.

"Conveyances," Sec. 4; Muller vs. Boggs, 25 Cal., 175.

Requisites  
for acknowl-  
edgments.

SEC. 1174. The acknowledgment of an instrument must not be taken unless the officer taking it knows, or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument.

N. Y. C. C., Sec. 520; "Conveyances," Sec. 6; *Kelsey vs. Dunlap*, 7 Cal., 160; *Wolf vs. Fogarty*, 6 Cal., 224.

Officer must  
indorse  
certificate.

SEC. 1175. An officer taking the acknowledgment of an instrument must indorse thereon a certificate, signed by himself, stating the fact of acknowledgment and that the person making the same was known to the officer to be the person whose name is subscribed to the instrument as a party, or was proved to be such by the oath or affirmation of a credible witness, whose name shall be inserted in the certificate. If the person is a married woman or an attorney in fact, the certificate shall contain such additional facts as are required by Secs. 1177 and 1178.

[New section.] Based on Sec. 7, "Conveyances;" *Kelsey vs. Dunlap*, 7 Cal., 160; *Hopkins vs. Delaney*, 8 Cal., 85; *Bryan vs. Ramariz*, 8 Cal., 461; *Henderson vs. Grewell*, 8 Cal., 584; *Fogarty vs. Findey*, 10 Cal., 239; *Touchard vs. Crow*, 20 Cal., 150; *Stark vs. Barrett*, 15 Cal., 361; *Colton vs. Seavy*, 22 Cal., 496; *Kimball vs. Semple*, 25 Cal., 440; *Jansen vs. Cahill*, 22 Cal., 563; *McMinn vs. O'Conner*, 27 Cal., 328.

Form of  
certificate.

SEC. 1176. The certificate must be substantially in the following form:

STATE OF —, }  
County of —, } ss.

On this — day of —, in the year —, before me [here insert the name of the officer, followed by the name of the office], personally appeared —, known to me [or proved to me on the oath of —] to be the person whose name is subscribed to the within instrument, and acknowledged to me that he [or they] executed the same.

[Name of officer and name of office.]

[New section.]

Attorney in  
fact must  
exhibit to  
officer, what.

SEC. 1177. When an instrument is subscribed in the name of the principal, by an attorney in fact, who desires to acknowledge the same, he must exhibit to the officer—

1. A power of attorney, duly acknowledged or proved

for recording, authorizing the execution of the instrument; or,

2. If recorded, the original or a certified copy of the record thereof.

[New section.]

SEC. 1178. The certificate of acknowledgment by an attorney in fact must be substantially in the following form :

Form of certificate when acknowledgment is by attorney in fact.

STATE OF —, }  
County of —. } ss.

On this — day of —, in the year —, before me [here insert the name of the officer, followed by the name of the office], personally appeared —, known to me [or proved to me on the oath of —] to be the person whose name is subscribed to the within instrument as the attorney in fact of —, and exhibited to me a power of attorney duly acknowledged [or proved, if so], purporting to be subscribed by said —, and acknowledged to me that — subscribed the name of — thereto as principal, and his own name as attorney in fact.

[Name of officer and name of office.]

[New section.] Goode vs. Smith and Wife, 13 Cal., 83; Hopkins vs. Delaney, 8 Cal., 85; Jansen vs. McCahill and Wife, 22 Cal., 563.

SEC. 1179. The acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken, unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband, nor certified unless she thereupon acknowledges to the officer that she executed the instrument, and that she does not wish to retract such execution.

Acknowledgment by married women.

[New section.] "Conveyances," Sec. 23; N. Y. C. C., Sec 521; Jansen vs. McCahill, 22 Cal., 563; Kendall vs. Miller, 9 Cal., 591; Pease vs. Barbiers, 10 Cal., 436.

SEC. 1180. The certificate of the acknowledgment of a married woman must be substantially in the following form :

Form of certificate when acknowledgment is by married woman.

STATE OF —, }  
County of —. } ss.

On this — day of —, in the year —, before me [here insert the name of the officer, followed by the name

of the office], personally appeared ———, known to me [or proved to me on the oath of ———] to be the person whose name is subscribed to the within instrument, described as a married woman; and, upon an examination without the hearing of her husband, I made her acquainted with the contents of the instrument and thereupon she acknowledged to me that she executed the same, and that she does not wish to retract such execution.

[Name of officer and name of office.]

[New section.]

Conveyance  
by married  
woman.  
effect of.

SEC. 1181. A conveyance or other instrument affecting real property, when acknowledged by a married woman, has the same effect as if she were unmarried, and may be acknowledged in the same manner, except as mentioned in the last two sections, but has no validity until so acknowledged.

N. Y. C. C., Sec. 522.

Interpreter  
may be  
employed.

SEC. 1182. An interpreter may be employed and sworn by the officer, to interpret, in taking acknowledgment or proof of an instrument, when the parties acknowledging or the witnesses proving do not understand the English language. An interpreter is prima facie presumed to have been employed when necessary, and the fact need not be stated in the certificate.

[New section.]

Proof of  
execution,  
how made.

SEC. 1183. Proof of the execution of an instrument, when not acknowledged, may be made, either—

1. By the party executing it, or either of them; or,
2. By a subscribing witness; or,
3. By other witnesses, in cases mentioned in Sec. 1187.

[New section.] "Conveyances," Sec. 10—modified.

Witness  
must be  
personally  
known to  
officer.

SEC. 1184. If by a subscribing witness, such witness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness.

[New section.] "Conveyances," Sec. 11—modified.

Witness  
shall prove,  
what.

SEC. 1185. The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such

person executed it, and that the witness subscribed his name thereto as a witness.

[New section.] "Conveyances," Sec. 12—modified.

SEC. 1186. The officer taking the proof must indorse a certificate on the instrument, which must set forth—

Certificate of officer shall be indorsed thereon, setting forth what.

1. If proved by the party: the facts required to have been shown in the certificate of acknowledgment of the party, if it had been taken.

2. If proved by the subscribing witness: that such witness was personally known to the officer granting the certificate to be the person whose name is subscribed to the instrument as a witness, or was proved to be such by the oath or affirmation of a witness whose name must be inserted in the certificate.

3. The proof given by the witness of the execution of the instrument, and of the facts that the person whose name is subscribed to it as a party is the party who executed the same, and that the witness subscribed his name to the instrument as a witness.

[New section.] "Conveyances," Sec. 13—modified; *Kelsey vs. Dunlap*, 7 Cal. 160; *Fogarty vs. Finlay*, 10 Cal., 239; *Whitney vs. Arnold*, 10 Cal., 531.

SEC. 1187. The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, in the following cases:

Handwriting may be proved, when

1. When the parties and all the subscribing witnesses are dead; or,

2. When the parties and all the subscribing witnesses are non-residents of the State and refuse to appear and make proof before the proper officer in the jurisdiction where they reside; or,

3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or,

4. When the subscribing witness conceals himself, or cannot be found by the officer by the exercise of due diligence, in attempting to serve the subpoena or attachment; or,

5. In case of the continued failure or refusal of the witness to testify, for the space of one hour, after his appearance.

[New section.] Stats. 1851, 521; "Conveyances," Sec. 17—modified; *Landers vs. Bolton*, 26 Cal., 393.

Evidence  
must prove,  
what.

SEC. 1188. The evidence must satisfactorily prove to the officer the following facts:

1. One or more of the conditions mentioned in the preceding section; and,
2. That a witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine; and,
3. That a witness testifying personally knew the person who subscribed the instrument as a witness, and is well acquainted with his signature, and that it is genuine.

[New section.] "Conveyances," Sec. 15—modified.

Certificate  
of officer.

SEC. 1189. The officer shall indorse on the instrument his certificate, stating the precedent fact contained in the subdivision of Sec. 1187 upon which is founded the right to prove the execution of the instrument by other than subscribing witnesses; also, the facts required to be proved in the preceding section.

[New section.] "Conveyances," Sec. 5, in substance.

Officers  
authorized  
to do certain  
things.

SEC. 1190. Officers authorized to take the proof of instruments, are authorized—

1. To administer oaths or affirmations, as prescribed in Sec. 2093, CODE OF CIVIL PROCEDURE.
2. To issue subpoena, as prescribed in Sec. 1986, CODE OF CIVIL PROCEDURE.
3. To punish for contempt, as prescribed in Secs. 1991, 1993, 1994, CODE OF CIVIL PROCEDURE.

The civil damages and forfeiture to the party aggrieved, are prescribed in Sec. 1992, CODE OF CIVIL PROCEDURE

NOTE.—The sections above cited need to be examined, to make sure that they are ample enough for the purpose. The remedies in that Code and in the Conveyance Act are substantially duplicate.

Officers must  
affix their  
signatures.

SEC. 1191. Officers taking and certifying acknowledgments or proof of instrument for record, must authenticate their certificates by affixing thereto their signatures, followed by the names of their office and the city, county or district within which they have jurisdiction; also, their seals of office, if, by the laws of the State or country where the acknowledgment or proof is taken, or by



authority of which they are acting, they are required to have official seals.

[New section.] *Hastings vs. Vaughan*, 5 Cal., 315; *Mott vs. Smith*, 16 Cal., 533; *Ingoldsby vs. Juan*, 12 Cal., 564; *Touchard vs. Crow*, 20 Cal., 150.

**SEC. 1192.** When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the District Court, under the CODE OF CIVIL PROCEDURE, to obtain a judgment correcting the certificate. A copy of such judgment annexed to the instrument has the same effect as an acknowledgment certified under this chapter.

When instrument is improperly certified, party may have action to correct error.

[New section.] **NOTE.**—This section is a substitute for special proceedings before the County Judge, provided for in seven sections of the Act of 1860 (Stats. 1860, 177).

**SEC. 1193.** Any person interested under an instrument entitled to be proved for record, may institute an action in the District Court, under the CODE OF CIVIL PROCEDURE, against the proper parties, to obtain a judgment proving such instrument. The mode of proceeding and the rules of evidence are the same as in other civil actions. A copy of the judgment, showing the proof of the instrument, and attached thereto, entitles such instrument to record, with like effect as if acknowledged.

In certain cases, parties interested entitled to action in Court to obtain judgment of proof of an instrument for record.

[New section.] **NOTE.**—This is an ample concurrent remedy, which would be used only in cases where it is difficult to make the proof under the strict statutory mode.

**SEC. 1194** The legality of the execution, acknowledgment, proof, form or record of any conveyance or other instrument heretofore made, executed, acknowledged, proved or recorded, shall not be affected by anything contained in this chapter, but shall depend for its validity and legality upon the laws then existing.

Conveyances heretofore made to be governed by then existing laws.

"Conveyances," Sec. 42.

**SEC. 1195.** All conveyances of real property heretofore made and acknowledged, or proved according to the laws in force at the time of such making and acknowledgment or proof, shall have the same force as evidence, and be recorded in the same manner and with the like effect as conveyances executed and acknowledged in pursuance of this chapter.

Recording, and as evidence, to be governed by then existing laws.

"Conveyances," Sec. 41.

Statutes  
curing  
acknowledg-  
ments, etc.,  
preserved.

Sec. 1196. The repeal or superseding of statutes, validating or curing void or defective proof or acknowledgment, or recording of an instrument, does not abolish or alter the effects of such statutes, but they continue in like manner and extent as if the statutes were not repealed or superseded.

[New section.] NOTE.—Based on a large number of curative statutes.

### ARTICLE III.

#### EFFECT OF RECORDING.

##### SECTION 1200. Purchaser for value.

- 1201. Unrecorded instrument valid between the parties.
- 1202. Unrecorded instrument, when void.
- 1203. Priority of record.
- 1204. Purchase from subsequent grantee without notice of prior unrecorded grant, valid.
- 1205. When prior and subsequent grant are both recorded, a vendee under the latter takes with notice of the former.
- 1206. Holder of recorded instrument is presumed bona fide purchaser as against whom.
- 1207. Actual notice, etc., evidence of bad faith.
- 1208. Circumstances to rebut presumption.
- 1209. Unrecorded instruments void as against encumbrances.
- 1210. Sheriff's grant has relation to encumbrance as muniment of title.
- 1211. Sheriff's grants and certificates of purchase subject to this article.
- 1212. Priority of record gives priority of right.
- 1213. Action in District Court to quiet title in certain cases.

Purchaser  
for value.

SEC. 1200. A purchaser for value of real property is one who acquires an interest in property under a real instrument mentioned in Sec. 1092, and for which he has paid a valuable consideration. A mortgagee or encumbrancer, and his assignees, are also purchasers for value when the mortgage or encumbrance is executed or created to secure bona fide obligations.

[New section.] NOTE.—There are so many places where this term "purchasers for value," occurs in the Code, that it seems necessary to extend its meaning to embrace all things necessary under Sec. 1092, and mortgages, contrary to the intention manifested in note to Sec. 1092. The provisions of this article are applied to mortgages by Sec. ——. See Title on *Mortgages*.

**SEC. 1201.** An unrecorded instrument is valid as between the parties thereto and those who have notice thereof.

Unrecorded instrument valid between the parties.

[New section.] Based on "Conveyances," Secs. 24, 25, 26; Landers et al. vs. Bolton, 26 Cal., 393.

**SEC. 1202.** An unrecorded instrument is void as against an instrument acquired in good faith and for value, properly acknowledged, or proved, certified and recorded, affecting the same property and derived from the same source.

Unrecorded instrument, when void.

[New section.] Based on "Conveyances," Secs. 24, 25, 26; Clark vs. Foy, 20 Cal.

**SEC. 1203.** A prior instrument affecting real property, recorded after the recording of a subsequent instrument affecting the same property, and derived from the same source, must not be deemed recorded as against the subsequent instrument.

Priority of record.

[New section.]

**SEC. 1204.** A person acquiring an instrument in good faith and for value, of a person holding under a recorded instrument, takes the right or property, as against any claims of another holding under a prior unrecorded instrument affecting the same property and derived from the same source.

Purchase from subsequent grantee without notice of prior unrecorded grant, valid.

[New section.] Mahoney vs. Middleton, Supreme Court of Cal., Jan. Term, 1871.

**SEC. 1205.** When a prior instrument is recorded subsequently to the recording of a subsequent instrument, a person taking from the holder of the subsequent instrument, takes with notice of all facts and conditions existing between the holders of the prior and subsequent instruments as to good faith and valuable consideration.

When prior and subsequent grant are both recorded, a vendee under the latter takes with notice of the former.

[New section.]

**SEC. 1206.** The holder of a recorded instrument is presumed, as against the holder of an unrecorded instrument, to be a holder in good faith, but the former must affirmatively show a valuable consideration.

Holder of recorded instrument is presumed bona fide purchaser as against whom.

[New section.] **NOTE.**—This modifies the rule in *Lander vs. Bolton* (26 Cal., 393), and in *Long vs. Dollarhide* (24 Cal., 218), but is sustained by *Bassett vs. Norsworthy* (2 Leading Cases in Equity, 84).

Actual notice, etc., evidence of bad faith.

**SEC. 1207.** Actual notice of the unrecorded instrument, by the holder of the recorded instrument subsequently executed, is *prima facie* evidence of bad faith.

[New section.]

Circumstances to rebut presumption.

**SEC. 1208.** Possession of the premises under the unrecorded instrument, or inadequacy of consideration for the recorded instrument, are circumstances tending to show actual notice or bad faith, and to rebut the presumption mentioned in Sec. 1206.

[New section.] *Fair vs. Stevenot*, 29 Cal., 486; *Stafford vs. Lick*, 7 Cal., 489; *Hunter vs. Watson*, 12 Cal., 376; *Lastrade vs. Baith*, 19 Cal., 676; *Dutton vs. Wauschaner*, 21 Cal., 627; *Lander vs. Bolton*, 26 Cal., 393.

Unrecorded instruments void as against encumbrances.

**SEC. 1209.** An unrecorded instrument is also void as against encumbrances acquired in good faith and for value, and duly authenticated and recorded by authority of any existing law.

[New section.] "Conveyances," Secs. 24, 25, 26, amplified to cover all classes of liens. *Hunter vs. Watson*, 12 Cal., 363.

Sheriff's grant has relation to encumbrance as muniment of title.

**SEC. 1210.** A grant made by a Sheriff, or other officer or person, to satisfy an encumbrance on real property, relates back to the time of creating or recording the encumbrance, and both the encumbrance and grant are muniments of the same title.

[New section.]

Sheriff's grants and certificates of purchase subject to this article.

**SEC. 1211.** Sheriffs' grants or certificates of purchase are subject to the provisions of this article, and are governed by the same rules with respect to unrecorded instruments as are other real instruments.

[New section.] *Hunter vs. Watson*, 12 Cal., 363.

Priority of record gives priority of right.

**SEC. 1212.** Priority of record establishes priority of right, subject to the conditions of good faith and valuable consideration.

[New section.] Based on "Conveyances," Sec. 26.

**NOTE.**—Instruments, "to operate as notices to third persons," must be recorded. ("Conveyances," Sec. 24, 1850.)

Instruments "shall, from the time of filing, impart notice to *all persons*," and all "subsequent purchasers and mortgagees shall be deemed to purchase with notice." ("Conveyances," Sec. 25, 1850.)

The words "*all persons*" mean subsequent "purchasers and mortgagees." (*McCabe vs. Grey*, 20 Cal., 509.)

Sec. 25 was amended February, 1864 (Stats. 1864, 85), so as to read "and subsequent purchasers, mortgagees and *lien holders* shall be deemed to purchase and take with notice."

What kind of *lien holders*? Was it the intention to protect encumbrancers and *lien holders* of all kinds against unrecorded deeds? It would seem so, yet the purpose is but half expressed. The new section (26) has not been amended so as to declare the further and final effect of want of recording as against *lien holders*. A *lien holder* is not a "purchaser," within Sec. 26, nor the *lien* a "conveyance," within Sec. 36. There is unnecessary incongruity in our laws upon this subject.

There are three classes protected against unrecorded instruments:

1. Purchasers and mortgagees in good faith, under Secs. 26 and 36, "Conveyances."
2. *Lien holders* (doubtful) under Sec. 25, as amended.
3. Creditors, in cases of transfer of personal property without delivery, etc., under Sec. 15, "Fraudulent Conveyances and Contracts," *conclusively fraudulent against creditors*.

Why should one effect be given to an unrecorded deed and another to a sale of undelivered property?

There is no good reason why all these transfers, whether of real or personal property, where certain evidences of them are required to be public in order to protect the public, should not have the *same* effect—all void against *creditors, lien holders, mortgagees* and *purchasers*, or all void as against any of them which might be specified.

Uniformity is most desirable. In Virginia, and in some other States, an unrecorded deed is void as against *creditors*.

We do not propose to change the law in this particular, but we do propose to give certainty by making an unrecorded instrument void as against subsequent purchasers and *encumbrancers*, and leave the Legislature to further consider the question of uniformity, as between transfers of real and personal property, as to unrecorded real instruments and undelivered personal property.

The intention of this article is, to make the public records the evidence of ownership of real property, and to protect, equally and by the *same* rules, purchasers and mortgagees in good faith and for value; also, *creditors*, after acquiring a specific *lien* by attachment or levy of execution, or a general *lien* by docketed judgment; also, mechanics' *liens* and others.

Sec. 1213. Any person interested in real property may have an action in the District Court against any or all persons claiming right or title to such property in contravention of his claim of title, whether such claim

Action in District Court to quiet title in certain cases

arises from the effect of recording laws or otherwise, or whether he is in or out of possession of the property. In such case, the person in possession must be made a party.

[New section.]      **NOTE.**—To be transferred to the Code of Civil Procedure.

#### ARTICLE IV.

##### MODE OF RECORDING.

**SECTION 1217.** In what office.

1218. Instrument, when deemed recorded.

1219. Books of record.

1220. Duties of Recorder.

1221. Transfers of vessels.

In what  
office.

**SEC. 1217.** Instruments entitled to be recorded under this chapter must be recorded by the County Recorder of the county in which the real property affected thereby is situated.

N. Y. C. C., Sec. 512.

Instrument,  
when deem-  
ed recorded.

**SEC. 1218.** An instrument is deemed recorded when duly acknowledged or proved, certified and deposited in the Recorder's office, with the proper officer, and by him filed for record, by noting thereon such filing, with the minute, hour, day and year thereof, and subscribing the same.

[New section.]      Based on "Recorder of County," Secs. 16, 17.

Books of  
record.

**SEC. 1219.** Grants, absolute in terms, and not intended as mortgages, or as securities in the nature of mortgages, are to be recorded in one set of books, and mortgages and securities in another.

N. Y. C. C., Sec. 513.

Duties of  
Recorder.

**SEC. 1220.** The duties of County Recorders, in respect to recording instruments, are prescribed by the POLITICAL CODE.

Transfers of  
vessels.

**SEC. 1221.** The mode of recording transfers of ships registered under the laws of the United States, is regulated by Acts of Congress.

N. Y. C. C., Sec. 515; Stats. 1868, 111.

## CHAPTER V.

## UNLAWFUL TRANSFERS.

**SECTION 1227.** Certain instruments void against purchasers, etc.

1228. Not void against purchaser having notice, unless fraud is mutual.

1229. Power to revoke, when deemed executed.

1230. Same.

1231. Other provisions.

**SEC. 1227.** Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer, for value, of the same property, or the rents or profits thereof.

Certain instruments void against purchasers, etc.

N. Y. C. C., Sec. 535; "Fraudulent Conveyances and Contracts," Sec. 1.

**SEC. 1228.** No instrument is to be avoided under the last section, in favor of a subsequent purchaser or encumbrancer having notice thereof at the time his purchase was made or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended.

Not void against purchaser having notice, unless fraud is mutual.

N. Y. C. C., Sec. 536; "Fraudulent Conveyances and Contracts," Sec. 2.

**SEC. 1229.** Where a power to revoke or modify an instrument affecting the title to, or the enjoyment of, an estate in real property, is reserved to the grantor, or given to any other person, a subsequent grant of or charge upon the estate, by the person having the power of revocation, in favor of a purchaser or encumbrancer for value, operates as a revocation of the original instrument, to the extent of the power, in favor of such purchaser or encumbrancer.

Power to revoke, when deemed executed.

N. Y. C. C., Sec. 537; "Fraudulent Conveyances and Contracts," Sec. 3.

**SEC. 1230.** Where a person having a power of revocation, within the provisions of the last section, is not entitled to execute it until after the time at which he makes such a grant or charge as is described in that section, the

Same.

power is deemed to be executed as soon as he is entitled to execute it.

N. Y. C. C., Sec. 538; "Fraudulent Conveyances and Contracts," Sec. 5.

Other provisions.

Sec. 1231. Other provisions concerning unlawful transfers are contained in Part II, Division Fourth, of this Code, concerning the special relations of debtor and creditor.

N. Y. C. C., Sec. 541.

## TITLE V.

### HOMESTEADS.

#### CHAPTER I. GENERAL PROVISIONS RELATING TO HOMESTEADS.

##### II. THE HOMESTEAD OF THE HEAD OF A FAMILY.

##### III. THE HOMESTEAD OF A PERSON OTHER THAN THE HEAD OF A FAMILY.

### CHAPTER I.

#### GENERAL PROVISIONS RELATING TO HOMESTEADS.

SECTION 1237. Homestead, what constitutes, and its exemption.

1238. Homestead, from what property may be taken.

1239. Debts from which homestead is not exempt.

1240. Conveyances, mortgages, etc., how executed, acknowledged and recorded.

1241. Homestead, how abandoned.

1242. Proceedings when homestead is claimed to exceed the amount of exemption.

1243. How property disposed of on report of appraisers.

1244. Fees, when the claimant to pay and when the judgment creditor.

1245. Official duties, how enforced.

1246. Who may acquire homesteads, and of what value.

Homestead, what constitutes and its exemption.

SEC. 1237. The homestead consists of a quantity of land or town lots, with the dwelling house or portion of a dwelling house thereon, and its appurtenances, selected and recorded as in this Title provided, and is not subject to sale under execution or any final process from any Court for any debt or liability contracted or incurred by



the party entitled thereto, and who selected and recorded the same, except as hereinafter provided.

Const., Art. XI, Sec. 15; Stats. 1851, 296, Sec. 1; 1860, 311, Sec. 1; Estate of Delaney, 37 Cal., 173.

SEC. 1238. The homestead may be selected by, or ad-measured to, the claimant, from any property, the title to which is vested in the claimant or husband of the claimant, or from community property of the husband and wife, or from any property owned by the claimant or husband of the claimant, as joint tenant, tenant in common or coparcener, to the extent of such interest, when the claimant, or the claimant's husband, is in exclusive occupation of such property or the portion claimed as a homestead. Being selected and recorded as a homestead does not in any manner affect or prevent partition of the property among the owners in any method authorized by law.

Homestead, from what property may be taken.

Stats. 1867-8, 116, Secs. 1, 3.

SEC. 1239. The homestead is, liable for and subject to sale under execution or other process, for the payment of the debts and liabilities following, to wit:

Debts from which homestead is not exempt.

1. Mechanics', laborers' and vendors' liens, legally obtained.

2. Mortgages for the purchase money.

3. Mortgages for money loaned, when executed and acknowledged by the husband and wife, and recorded as provided in this chapter.

4. Mortgages executed and acknowledged by the debtor alone, who has no wife, or whose wife was a non-resident of the State at the time, or before, the homestead was recorded.

5. A judgment rendered and recorded against a debtor before he recorded his homestead.

6. A debt or liability contracted or assumed before filing his homestead, by one being neither a husband nor wife, nor the head of a family.

[New section.]

Stats. 1851, 296, Sec. 2; 1860, 89, Sec. 9; 1860, 311, Sec. 2; 1862, 519, Sec. 2; Sears vs. Dixon, 33 Cal., 326; Rix vs. Henry, 7 Cal., 89; Himmelman vs. Schmidt, 23 Cal., 117.

SEC. 1240. No alienation, sale, conveyance, or mortgage upon the homestead, is valid or effectual for any pur-

Conveyances  
mortgages,  
etc., how  
executed, ac-  
knowledged  
and recorded

pose unless executed and acknowledged by the owner and also by his wife, if he has one resident in the State, in the manner provided for her execution of conveyances of her separate real property; and the instrument is recorded in the Recorder's office where the homestead is recorded, and an abandonment of the homestead claim is contained in such instrument or separately made for that purpose and recorded in the same Recorder's office.

Stats. 1851, 296, Sec. 2; 1860, 311, Sec. 2; 1862, 519, Sec. 2.

Homestead,  
how aban-  
doned.

SEC. 1241. No homestead is abandoned unless in writing embodied in a deed, mortgage, or other conveyance thereof, or in an abandonment in writing, duly executed, acknowledged and recorded in the Recorder's office where the homestead declaration or title is recorded.

Stats. 1851, 296, Sec. 2; 1862, 519, Sec. 2.

Proceedings  
when home-  
stead is  
claimed to  
exceed the  
amount of  
exemption.

SEC. 1242. When an execution is issued and levied upon a homestead, and the execution creditor makes affidavit before the County or District Judge of the county where the homestead is situated, that the cash value thereof, to the best of his knowledge and belief, exceeds the value of the homestead exemption to which the judgment debtor is entitled, the Judge must, after two days' notice to the judgment debtor of the making of such affidavit, appoint three disinterested and competent persons appraisers, to estimate and report the value of the homestead; who, after being sworn, must proceed to view and appraise the same, and report to the Judge the value thereof; and if the value exceeds the amount of the homestead exemption to which such person is entitled, whether it can be so divided as to leave so much of the homestead as amounts to the exemption, without material injury.

Stats. 1851, 296; Sec. 3; 1860, 312, Sec. 3.

How prop-  
erty disposed  
of on report  
of appraisers

SEC. 1243. If it appears that the premises cannot be thus divided, and that the value thereof exceeds the exemption allowed by this Title, he must order the entire premises to be sold, and out of the proceeds the sum to which the judgment debtor is entitled to as a homestead exemption to be paid to the defendant in the execution, and the excess to be applied to the satisfaction of the execution. No bid must be received by the officer mak-

ing the sale under the amount of homestead exemption to which the judgment debtor is entitled; and when the execution is against a husband whose wife is living, the Judge may, in his discretion, direct five thousand dollars of the purchase money to be deposited in Court, to be paid out only upon the joint receipt of the husband and wife. Such purchase money possesses all the protection against legal process and the voluntary disposition of the husband, as did the original homestead premises.

Stats. 1851, 296, Sec. 3; 1860, 312, Sec. 3.

Sec. 1244. For every homestead appraised or admeasured in accordance with the provisions of this Title, the homestead claimant must pay to the county General Fund, for use of the county, the sum of ten dollars, and file the receipt therefor with the County Auditor; and must pay each appraiser three dollars per day for the time necessarily employed. If in an appraisement, or at a sale had at request of a judgment creditor, as provided in the two preceding sections, the property does not exceed in value the amount of homestead exemption to which the judgment debtor is entitled, the judgment creditor must pay all costs of the proceedings.

Stats. 1860, 89, Sec. 10.

Fees, when the claimant to pay and when the judgment creditor.

Sec. 1245. The homestead claimant may, by proper process, compel the County Judge to act in performing the duties herein enjoined; and the County Judge may enforce his orders and appointments by due process, and fine as for contempt.

Official duties, how enforced.

[New section.]

Sec. 1246. Homesteads may be acquired in the manner provided in this Title, by the persons and of the value following:

Whom may acquire homesteads, and of what value.

1. By the husband and wife, or either of them, or other "head of a family," not exceeding in value five thousand dollars.

2. By any other person, who is either a resident citizen of this State or who can become such, not exceeding in value one thousand dollars.

[New section.] Stats. 1851, 296, Sec. 1; 1860, 87, Sec. 1; 311, Sec. 1; 1862, 519, Sec. 1.

## CHAPTER II.

## THE HOMESTEAD OF THE HEAD OF A FAMILY.

SECTION 1252. Homestead declaration, what to contain.

1253. "Head of a family" defined.

1254. Declaration, how executed and recorded, and the title thereby vested.

Homestead  
declaration,  
what to con-  
tain.

SEC. 1252. The husband and wife, or either of them, or other "head of a family," in order to acquire a homestead, must make a declaration containing the following facts and statements:

1. That they are husband and wife, or a husband or wife, or other "head of a family," stating the facts and circumstances.

2. That they are at the time residing on the premises sought to be claimed as a homestead, with their family, or with some one or more of the persons by the care and maintenance of whom the claimant is constituted the "head of a family."

3. A particular description of the premises sought to be claimed as a homestead.

4. An intention to claim and use the premises described as a homestead.

5. How, when and by what means the title to the premises was acquired, and whether it is community or separate property, or held as tenant in common, joint tenant or coparcener.

6. The value of the intended homestead; or that it does not exceed in value the sum of five thousand dollars.

Stats. 1851, 296, Sec. 1; 1860, 311, Sec. 1.

"Head of a  
family" de-  
fined.

SEC. 1253. In addition to the husband and wife, jointly or severally, the term "head of a family," as used in this chapter, means any one who has residing on the homestead property with him, and under his care and maintenance, either—

1. His minor child, or the minor child of his or her deceased wife or husband.

2. A minor brother or sister, or the minor child of a deceased brother or sister.

3. A father or mother, or grandfather or grandmother.

4. The father, mother, grandfather or grandmother of a deceased husband or wife; or,

5. An unmarried sister, or helpless or deformed brother.

Stats. 1851, 296, Sec. 5; 1862, 519, Sec. 3.

NOTE.—The class of persons who confer the "nomer" of "head of a family" is by this section enlarged, for obviously apparent reasons.

SEC. 1254. The declaration must be signed by the party making it, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded. When such record is made by either husband or wife, or by both, they hold the homestead as joint tenants during their natural lives, and on the death of either, subject to no other liability than such as is created in accordance with this chapter, it descends to, and the title thereof vests absolutely in, the survivor; if there is no survivor, then in his legitimate children; if no legitimate children, then the property is subject to his legal debts, and to administration and succession, as provided in this Code and the CODE OF CIVIL PROCEDURE.

Declaration, how executed and recorded, and the title thereby vested.

Stats. 1860, 311, Secs. 1, 4; 1862, 519, Sec. 2; 1870, 400, Sec. 1; 1865-6, 850, Sec. 1; 1867-8, 172, Sec. 1.

### CHAPTER III.

#### THE HOMESTEAD OF A PERSON OTHER THAN THE HEAD OF A FAMILY.

SECTION 1260. Petition to County Judge for homestead, what to contain.

1261. Judge to appoint appraisers, who must make oath.

1262. If property exceeds one thousand dollars in value, what to be done.

1263. Return of appraisers, and Judge to grant certificate.

1264. Title to be recorded, where and how.

SEC. 1260. Any person other than a husband or wife, or other "head of a family," desiring to have a homestead set apart and recorded, must present to the County Judge of the county where the premises intended to be claimed as a homestead is situated, a written application setting forth—

Petition to County Judge for homestead, what to contain.

1. That he is a resident citizen of this State, or capable of and intends becoming such.

2. That he is at the time residing thereon or preparing the same for a residence, and intends to use the same as a homestead.

3. A description of the premises sought to be claimed as a homestead, not exceeding three hundred and twenty feet square, if in a city or town, or three hundred and twenty acres, if situated elsewhere, and that the value thereof does not exceed one thousand dollars.

Stats. 1860, 87-8, Sec. 2.

Judge to  
appoint ap-  
praisers,  
who must  
make oath.

SEC. 1261. On receiving the application provided for in the preceding section, duly verified, the County Judge must appoint three respectable and competent persons, freeholders or householders of the county, who must inspect the premises and appraise the value thereof. In case the persons so appointed, or any of them, fail or refuse to act, the Judge may, from time to time, make such additional appointments of appraisers as the case may require. Before acting, the appraisers must take and subscribe an oath, before some officer competent to administer oaths, that they will fairly and impartially appraise the premises according to the actual value thereof.

Stats. 1860, 88, Secs. 4, 5.

If property  
exceeds one  
thousand  
dollars in  
value, what  
to be done.

SEC. 1262. If the appraisement exceeds the sum of one thousand dollars, including the improvements thereon, the appraisers, at the request of the applicant, must admeasure and lay off a less quantity of the land, with such boundaries as the applicant may direct, so that the value of the part so admeasured and laid off, together with the improvements thereon, does not exceed the value of one thousand dollars. The agreement of two appraisers constitutes the appraisement.

Stats. 1860, 88, Sec. 5.

Return of  
appraisers,  
and Judge  
to grant  
certificate.

SEC. 1263. The appraisers must return to the Judge appointing them, their written oath, attached to their appraisement and report, setting forth an accurate description of the property by metes and bounds, and the value of the homestead admeasured. The Judge, on being satisfied that the proceedings of the appraisers were regular and their acts done in good faith, must make and deliver

to the applicant a certificate, in writing, setting forth the application, the oaths of the appraisers, the proceedings which took place under it and the return of the appraisers, annexed to the written application, which constitutes the homestead title, and must be delivered, on payment of all costs and expenses, to the applicant.

Stats. 1860, 88, Secs. 6, 7.

Sec. 1264. The homestead title must be recorded in the office of the County Recorder of the county in which the homestead is situated, in a book to be called the "Register of Homesteads of Single Persons;" and, when the homestead is situate in more counties than one, the homestead title must be recorded in the Recorder's office of each of the counties where any part is situated. From the date of the record the homestead title is vested in the applicant during his natural life.

Title to be recorded, where and how.

Stats. 1860, 88, Secs. 8, 9.

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## TITLE VI.

### WILLS.

- CHAPTER I. EXECUTION AND REVOCATION OF WILLS.  
 II. INTERPRETATION OF WILLS.  
 III. GENERAL PROVISIONS RELATING TO WILLS.

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### CHAPTER I.

#### EXECUTION AND REVOCATION OF WILLS.

- SECTION 1270. Who may make a will.  
 1271. Monomaniac incompetent.  
 1272. Will or part thereof procured by fraud.  
 1273. Separate property of married women.  
 1274. What may pass by will.  
 1275. Who may take by will.  
 1276. Written will, how to be executed.  
 1277. Witness to add residence.  
 1278. Mutual will.  
 1279. Competency of subscribing witness.  
 1280. Conditional will.

**SECTION 1281.** Gifts to subscribing witnesses void. Creditors competent witness.

1282. Witness who is a devisee and who would be entitled to share of testator's estate if no will, entitled to share to amount of devise.

1283. Will made out of this State.

1284. Will not duly executed, void.

1285. Subsequent change of domicile.

1286. Republication by codicil.

1287. Nuncupative will, how to be executed.

1288. Requisites of a valid nuncupative will.

1289. Proof of nuncupative wills.

1290. Probate of nuncupative wills.

1291. Written will, how revoked.

1292. Evidence of revocation.

1293. Revocation by obliteration on face of will.

1294. Revocation of duplicate.

1295. Revocation by subsequent will.

1296. Antecedent not revived by revocation of subsequent will.

1297. Revocation by marriage and birth of issue.

1298. Effect of marriage of a man on his will.

1299. Effect of a marriage of a woman on her will.

1300. Contract of sale not a revocation.

1301. Mortgage not a revocation of will.

1302. Conveyance, when not a revocation.

1303. When it is a revocation.

1304. Revocation of codicils.

1305. Afterborn child, unprovided for, to succeed.

1306. Children or issue of children of testator unprovided for by his will.

1307. Share of afterborn child, out of what part of estate to be paid.

1308. Advancement during lifetime of testator.

1309. Death of devisee, being relation of testator, in lifetime of testator, leaving lineal descendants.

1310. Devises of land, how construed.

1311. Will to pass rights acquired after the making thereof.

Who may  
make a will.

**SEC. 1270. (§ 1.)** Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is subject to succession, as provided for in Tit. VII of this Part, as the estate of an intestate, being chargeable in both cases with the payment of all the testator's debts, as provided in the CODE OF CIVIL PROCEDURE.

Stats. 1850, 177, Sec. 1.

Monomaniac  
incompetent

**SEC. 1271.** A person having any insane delusion is incompetent to make a will.

N. Y. C. C., Sec. 543.



**SEC. 1272.** A will or part of a will procured to be made by duress, menace, fraud or undue influence, may be denied probate; and a revocation, procured by the same means, may be declared void.

Will or part thereof procured by fraud.

N. Y. C. C., Sec. 544.

**SEC. 1273.** (§ 2.) A married woman may dispose of all her separate estate by will, absolutely, without the consent of her husband, either express or implied, and may alter or revoke the same in like manner as a person under no disability may do; her will must be attested, witnessed and proved in like manner as all other wills.

Separate property of married women.

Stats. 1850, 177, Sec. 2; 1865-6, 317, Sec. 1; Morrison vs. Bowman, 29 Cal., 337.

**SEC. 1274.** Every estate and interest in real or personal property, to which heirs, husband, widow or next of kin might succeed, may be disposed of by will; but community property is subject to Secs. 1396 and 1397.

What may pass by will.

N. Y. C. C., Sec. 545—modified.

**SEC. 1275.** A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that no corporation can take under a will, unless expressly authorized by its charter or by statute so to take.

Who may take by will.

N. Y. C. C., Sec. 546.

**SEC. 1276.** (§ 3.) Every will, other than a nuncupative will, must be in writing, and must be executed and attested as follows:

Written will, how to be executed.

1. It must be subscribed at the end thereof by the testator himself, or by some person in his presence and by his direction.

2. The subscription must be made in the presence of each of the attesting witnesses, or be acknowledged by the testator to each of them, to have been made by him or by his authority.

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request.

N. Y. C. C., Sec. 550; Stats. 1850, 177, Sec. 3.

Witness to  
add resi-  
dence.

SEC. 1277. A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will.

N. Y. C. C., Sec. 552.

Mutual will.

SEC. 1278. A conjoint or mutual will is valid, but it may be revoked by any of the testators, in like manner with any other will.

N. Y. C. C., Sec. 548.

Competency  
of subscrib-  
ing witness.

SEC. 1279. (§ 4.) If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause it may arise, does not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved.

Stats. 1850, 177, Sec. 4.

Conditional  
will.

SEC. 1280. A will, the validity of which is made by its own terms conditional, may be denied probate, according to the event, with reference to the condition.

N. Y. C. C., Sec. 549.

Gifts to sub-  
scribing  
witnesses  
void.

Creditors  
competent  
witness.

SEC. 1281. (§ 5.) All beneficial devises, legacies and gifts whatever, made or given in any will to a subscribing witness thereto, are void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts does not prevent his creditors from being competent witnesses to his will.

Stats. 1850, 177, Sec. 5.

Witness who  
is a devisee  
and who  
would be  
entitled to  
share of  
testator's  
estate if no  
will, enti-  
tled to share  
to amount  
of devise.

SEC. 1282. (§ 6.) If a witness, to whom any beneficial devise, legacy or gift is made or given, would have been entitled to any share of the estate of the testator, in case the will is not established, he succeeds to so much of the share as would have been distributed to him, not exceeding the devise or bequest made to him in the will; and he may recover the same of the devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

Stats. 1850, 177, Sec. 6.

**SEC. 1283. (§ 23.)** A will of real or personal property, or both, or a revocation thereof, made out of this State by a person not having his domicile in this State, is as valid, when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this State, and according to the provisions of this chapter.

Will made  
out of this  
State.

N. Y. C. C., Sec. 554; Stats. 1850, 179, Sec. 23.

**SEC. 1284.** No will or revocation is valid unless executed either according to the provisions of this chapter, or according to the law of the place in which it was made, or in which the testator was at the time domiciled.

Will not  
duly execu-  
ted, void.

N. Y. C. C., Sec. 555.

**SEC. 1285.** Whenever a will, or a revocation thereof, is duly executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, the same is regulated, as to the validity of its execution, by the law of such place, notwithstanding that the testator subsequently changed his domicile to a place by the law of which such will would be void.

Subsequent  
change of  
domicile.

N. Y. C. C., Sec. 556; *Norris vs. Harris*, 15 Cal., 226.

**NOTE.**—The three preceding sections change the rule of our statutes requiring all wills to be executed according to our laws, and admitted to probate as our laws require. These sections seem to be more liberal and just, and are therefore adopted. Sec. 1324 of the Code of Civil Procedure must be construed to conform to these sections.

**SEC. 1286.** The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil.

Republish-  
ation by cod-  
icil.

N. Y. C. C., Sec. 553; *Payne vs. Payne*, 18 Cal., 291.

**SEC. 1287.** A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities.

Nuncupative  
will, how to  
be executed.

N. Y. C. C., Sec. 551.

**SEC. 1288. (§ 7.)** To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed:

Requisites  
of a valid  
nuncupative  
will.

1. The estate bequeathed must not exceed in value the sum of one thousand dollars.

2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect.

3. The decedent must, at the time, have been in his last illness, or in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear or peril of death.

4. Except in the cases mentioned in Subd. 3 of this section, it must be made at the dwelling house of the testator, or where he was residing for the space of ten days or more, unless taken sick from home and death ensues before his return.

Stats. 1850, 177, Sec. 7; N. Y. C. C., Sec. 547.

Proof of  
nuncupative  
wills.

SEC. 1289. (§ 8.) No proof must be received of any nuncupative will, unless it is offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after they were spoken.

Stats. 1850, 178, Sec. 8.

Probate of  
nuncupative  
wills.

SEC. 1290. (§ 9.) No probate of any nuncupative will must be granted for fourteen days after the death of the testator, nor must any nuncupative will be at any time proved, unless the testamentary words, or the substance thereof, be first committed to writing, and process issued to call in the widow, or other person interested, to contest the probate of such will, if they think proper.

Stats. 1850, 178, Sec. 9.

Written will,  
how revoked

SEC. 1291. Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than—

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction.

N. Y. C. C., Sec. 561.

**SEC. 1292. (§ 10.)** When a will is cancelled or destroyed by any other person than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses.

Evidence of revocation.

N. Y. C. C., Sec. 562; Stats. 1850, 178, Sec. 10.

**SEC. 1293.** A revocation by obliteration on the face of the will may be partial or total, and is complete if the material part is so obliterated as to show an intention to revoke; but where, in order to effect a new disposition, the testator attempts to revoke a provision of the will, by altering or obliterating it on the face thereof, such revocation is not valid unless the new disposition is legally effected.

Revocation by obliteration on face of will.

N. Y. C. C., Sec. 563.

**SEC. 1294.** The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates.

Revocation of duplicate.

N. Y. C. C., Sec. 564.

**SEC. 1295.** A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will.

Revocation by subsequent will.

N. Y. C. C., Sec. 565.

**SEC. 1296. (§ 11.)** If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation or revocation, the first will is duly republished.

Antecedent not revived by revocation of subsequent will.

Stats. 1850, 178, Sec. 11.

**SEC. 1297.** If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such

Revocation by marriage and birth of issue.

issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received.

N. Y. C. C., Sec. 567.

Effect of marriage of a man on his will.

SEC. 1298. (§ 12.) If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received.

Stats. 1850, 178, Sec. 12.

Effect of a marriage of a woman on her will.

SEC. 1299. (§ 13.) A will, executed by an unmarried woman, is revoked by her subsequent marriage, and is not revived by the death of her husband.

Stats. 1850, 178, Sec. 13.

Contract of sale not a revocation.

SEC. 1300. (§ 14.) An agreement made by a testator, for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.

N. Y. C. C., Sec. 569; Stats. 1850, 178, Sec. 14.

Mortgage not a revocation of will.

SEC. 1801. (§ 15.) A charge or encumbrance upon any estate, for the purpose of securing the payment of money, or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed; but the devise and legacies therein contained must pass, subject to such charge or encumbrance.

Stats. 1850, 178, Sec. 15.

Conveyance, when not a revocation.

SEC. 1302. A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession.

N. Y. C. C., Sec. 571.

**SEC. 1303.** If the instrument by which an alteration is made in the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.

When it is a  
revocation.

N. Y. C. C., Sec. 572.

**SEC. 1304.** The revocation of a will revokes all its codicils.

Revocation  
of codicils.

N. Y. C. C., Sec. 573.

**SEC. 1305.** (§ 16.) Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.

Afterborn  
child, un-  
provided for,  
to succeed.

N. Y. C. C., Sec. 574; Stats. 1850, 178, Sec. 16.

**SEC. 1306.** (§ 17.) When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section.

Children or  
issue of chil-  
dren of tes-  
tator unpro-  
vided for by  
his will.

Stats. 1850, 178, Sec. 17.

**SEC. 1307.** (§ 18.) When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in the will, as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy or provision may be

Share of  
afterborn  
child, out of  
what part  
of estate to  
be paid.

exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

Stats. 1850, 178, Sec. 18.

Advance-  
ment during  
lifetime of  
testator.

Sec. 1308. (§ 19.) If such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding sections.

Stats. 1850, 179, Sec. 19.

Death of  
devisee, be-  
ing relation  
of testator,  
in lifetime  
of testator,  
leaving lin-  
eal descend-  
ants.

Sec. 1309. (§ 20.) When any estate is devised to any child, or other relation of the testator, and the devisee dies before the testator, leaving a successor, such successor takes the estate so given by the will, in the same manner as the devisee would have done had he survived the testator.

Stats. 1850, 179, Sec. 20.

Devises of  
land, how  
construed.

Sec. 1310. (§ 21.) Every devise of land in any will conveys all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

Stats. 1850, 179, Sec. 21.

Will to pass  
rights ac-  
quired after  
the making  
thereof.

Sec. 1311. (§ 22.) Any estate, right or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto was vested in him at the time of making the will, if it manifestly appears by the will to have been the intention of the testator. Every will made in express terms, devising or in any other terms denoting the intent of the testator to devise all the real estate of such testator, passes all such real estate which such testator was entitled to devise at the time of his decease.

Stats. 1850, 179, Sec. 22; 1865-6, 381, Sec. 1.

Norx.—The preceding chapter is taken from our own statutes on wills—the old section being given thus (1), in parenthesis—and from the New York Civil Code, to which reference is frequently made, as will be observed.



## CHAPTER II.

## INTERPRETATION OF WILLS, AND EFFECT OF VARIOUS PROVISIONS.

- SECTION 1317. Testator's intention to be carried out.
1318. Intention to be ascertained from the will.
1319. Rules of interpretation.
1320. Several instruments are to be taken together.
1321. Harmonizing various parts.
1322. In what case devise not affected.
1323. When ambiguous or doubtful.
1324. Words taken in ordinary sense.
1325. Words to receive an operative construction.
1326. Intestacy to be avoided.
1327. Effect of technical words.
1328. Technical words not necessary.
1329. Certain words not necessary to pass a fee.
1330. Power to devise, how executed by terms of will.
1331. Devise or bequest of all real or all personal property, or both.
1332. Residuary clause.
1333. Same.
1334. "Heirs," "relatives," "issue," "descendants," etc.
1335. Words of donation and of limitation.
1336. To what time words refer.
1337. Devise or bequest to a class.
1338. When conversion takes effect.
1339. When child born after testator's death takes under will.
1340. Mistakes and omissions.
1341. When devises and bequests vest.
1342. When cannot be divested.
1343. Death of devisee or legatee.
1344. Interests in remainder are not affected.
1345. Conditional devises and bequests.
1346. Condition precedent, what.
1347. Effect of condition precedent.
1348. Conditions precedent, when deemed performed.
1349. Conditions subsequent, what.
1350. Devisees, etc., take as tenants in common.
1351. Advancements, when adoptions.

SEC. 1317. A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

Testator's  
intention to  
be carried  
out

Kidwell vs. Brummagin, 32 Cal., 436.

SEC. 1318. In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from

Intention to  
be ascertain-  
ed from the  
will.

the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.

Rules of interpretation.

SEC. 1319. In interpreting a will, subject to the law of this State, the rules prescribed by the following sections of this chapter are to be observed, unless an intention to the contrary clearly appears.

Several instruments are to be taken together.

SEC. 1320. Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument.

Harmonizing various parts.

SEC. 1321. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

In what case devise not affected.

SEC. 1322. A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.

When ambiguous or doubtful.

SEC. 1323. Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will.

Words taken in ordinary sense.

SEC. 1324. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.

Words to receive an operative construction.

SEC. 1325. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.

Intestacy to be avoided.

SEC. 1326. Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.

Effect of technical words.

SEC. 1327. Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention.

**SEC. 1328.** Technical words are not necessary to give effect to any species of disposition by a will.

Technical words not necessary.

**SEC. 1329.** The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited.

Certain words not necessary to pass a fee.

**SEC. 1330.** Real or personal property embraced in a power to devise, passes by a will purporting to devise all the real or personal property of the testator.

Power to devise, how executed by terms of will.

**SEC. 1331.** A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death.

Devise or bequest of all real or all personal property, or both.

**SEC. 1332.** A devise of the residue of the testator's estate, property, or real property, passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will.

Residuary clause.

**SEC. 1333.** A bequest of the residue of the testator's estate, property, or personal property, passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will.

Same

**SEC. 1334.** A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives" or "personal representatives," or "family," "issue," "descendants," "nearest" or "next of kin" of any person, without other words of qualification, and when the terms are used as words of donation and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the Title on *Succession*, in this Code.

"Heirs," "relatives," "issues," "descendants," etc.

Norris vs. Hensley, 27 Cal., 39.

**SEC. 1335.** The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated, directly,

Words of donation and of limitation

and not as a qualification of an estate given to the ancestor of such person.

To what time words refer.

SEC. 1336. Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

Devise or bequest to a class.

SEC. 1337. A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.

When conversion takes effect.

SEC. 1338. When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death.

When child born after testator's death takes under will.

SEC. 1339. A child conceived before, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

Mistakes and omissions.

SEC. 1340. When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intention cannot be received.

When devise and bequests vest.

SEC. 1341. Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.

When cannot be divested.

SEC. 1342. A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.

Death of devisee or legatee.

SEC. 1343. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place.

**SEC. 1341.** The death of a devisee or legatee of a limited interest, before the testator's death, does not defeat the interests of persons in remainder, who survive the testator.

Interests in remainder are not affected.

**SEC. 1345.** A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

Conditional devises and bequests.

**SEC. 1346.** A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.

Condition precedent, what.

**SEC. 1347.** Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled; except where such fulfilment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will.

Effect of condition precedent.

**SEC. 1348.** A condition precedent in a will is to be deemed performed when the testator's intention has been substantially, though not literally, complied with.

Conditions precedent, when deemed performed.

**SEC. 1349.** A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event.

Conditions subsequent, what.

**SEC. 1350.** A devise or legacy given to more than one person vests in them as owners in common.

Devisees, etc., take as tenants in common.

**SEC. 1351.** Advancements or gifts are not to be taken as adoptions of general legacies, unless such intention is expressed by the testator in writing.

Advancements, when adoptions.

**NOTE.**—The preceding chapter is, in a modified form, taken from the New York Civil Code, from Secs. 579 to 613, inclusive. We have had no general rules of construction adopted by our Legislature, and after the preparation of the first chapter of this Title it was thought best to adopt also these rules of construction. The usual course of noting each section from which they are taken, for economy in printing, is departed from in this chapter.

## CHAPTER III.

## GENERAL PROVISIONS.

## SECTION 1357. Nature and designations of legacies.

1. Specific.
2. Demonstrative.
3. Annuities.
4. Residuary.
5. General.

1358. Order of sale in case of an intestate.

1359. Order of sale in case of a testator.

1360. Legacies, how charged with debts.

1361. Same.

1362. Abatement.

1363. Specific devises and legacies.

1364. Heir's conveyance good, unless will is proved within four years.

1365. Possession of legatees.

1366. Bequest of interest.

1367. Satisfaction.

1368. Legacies, when due.

1369. Interest.

1370. Construction of these rules.

1371. Executor according to the tenor.

1372. Power to appoint is invalid.

1373. Executor not to act till qualified.

1374. Provisions as to revocations.

1375. Execution and construction of prior wills not affected.

1376. "Wills" include codicils.

1377. The law of what place applies.

1378. Liability of beneficiaries for testator's obligations.

Nature and  
designations  
of legacies.

SEC. 1357. Legacies are distinguished and designated, according to their nature, as follows:

Specific.

1. A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator.

Demonstra-  
tive.

2. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy.

Annuities.

3. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy.

4. A residuary legacy embraces only that which remains Residuary.  
after all the bequests of the will are discharged.

5. All other legacies are general legacies. General.

**SEC. 1358.** When a person dies intestate, his prop- Order of sale  
in case of an  
intestate.  
erty, except such as is otherwise disposed of under this  
Code, and under Chap. V, Tit. XI, of the CODE OF CIVIL  
PROCEDURE, and exempt from execution therein, is to be  
resorted to, in the following order, in payment of debts:

1. Personal property.
2. Real property, other than estates of freehold.
3. Estates of freehold.

**SEC. 1359.** The property of a testator, with the excep- Order of sale  
in case of a  
testator.  
tion specified in the last section, is to be resorted to, in  
the following order, for the payment of debts and legacies:

1. Personal property, excepting such as is expressly  
exempted in the will.

2. Real property expressly devised to pay debts or  
legacies, where the personal property is exempted in the  
will, or where the personal property which is not ex-  
empted is insufficient.

3. Real property which is not effectually devised.

4. Property, real or personal, charged with debts or  
legacies; but though real property is charged with the  
payment of legacies, the personal property is not to be  
exonerated.

5. The following property, ratably: real property,  
devised without being charged with debts or legacies,  
and specific and demonstrative legacies.

6. Personal property expressly exempted in the will.

Cal. C. C. P., Tit. XI, Chap. VII.

**SEC. 1360.** In the application of the personal property Legacies,  
how charged  
with debts.  
of a decedent to the payment of debts, legacies must be  
charged in the following order, unless a different inten-  
tion is expressed in the will:

1. Residuary legacies.
2. General legacies.
3. Legacies given for a valuable consideration, or for  
the relinquishment of some right or interest.
4. Specific and demonstrative legacies.

Same.

**SEC. 1361.** Legacies to husband, widow or kindred of any class, are chargeable only after legacies to persons not related to the testator.

Abatement.

**SEC. 1362.** Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will.

Specific devise and legacies.

**SEC. 1363.** In a specific devise or legacy, the title passes by the will; but in case of legacies, possession can only be obtained from the personal representative; and he may be authorized by the Judge of the Probate Court to sell the property devised and bequeathed, in the cases herein provided.

Heir's conveyance good, unless will is proved within four years.

**SEC. 1364.** The rights of a purchaser or encumbrancer of real property, in good faith, and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless the instrument containing such devise is duly proved as a will, and recorded in the office of the Clerk of the Probate Court having jurisdiction thereof, or unless written notice of such devise is filed with the Clerk of the county where the real property is situated, within four years after the deviser's death.

N. Y. C. C., Sec. 621.

Possession of legatees.

**SEC. 1365.** Where specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or, if there is none, to the personal representative, an inventory of the property, expressing that the same is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee, or to the personal representative, as the case may be.

N. Y. C. C., Sec. 622.

Bequest of interest.

**SEC. 1366.** In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.

N. Y. C. C., Sec. 623.

Satisfaction.

**SEC. 1367.** A legacy, or a gift in contemplation, fear or peril of death, may be satisfied.



SEC. 1368. Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.

Legacies.  
when due.

SEC. 1369. Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease.

Interest.

SEC. 1370. The four preceding sections are in all cases to be controlled by a testator's express intention.

Construction  
of these  
rules.

SEC. 1371. Where it appears, by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor.

Executor  
according to  
the tenor.

SEC. 1372. An authority to an executor to appoint an executor is void.

Power to  
appoint is  
invalid.

SEC. 1373. No person has any power, as an executor, until he qualifies, except that, before letters have been issued, he may pay funeral charges and take necessary measures for the preservation of the estate.

Executor not  
to act till  
qualified.

SEC. 1374. The provisions of this Title in relation to the revocation of wills apply to all wills made by any testator living at the expiration of one year from the time it takes effect.

Provisions  
as to revoca-  
tions.

SEC. 1375. The provisions of this Title do not impair the validity of the execution of any will made before it takes effect, or affect the construction of any such will.

Execution  
and con-  
struction of  
prior wills  
not affected.

SEC. 1376. The term "will," as used in this Code, includes all codicils as well as wills.

"Wills" in-  
clude cod-  
icils.

Stats. 1850, 177, Sec. 24.

SEC. 1377. Except as otherwise provided, the validity and interpretation of wills is governed, when relating to real property within this State, by the law of this State; when relating to personal property, by the law of the testator's domicile.

The law of  
what place  
applies.

Liability of  
beneficiaries  
for testator's  
obligations.

SEC. 1378. Those to whom property is given by will are liable for the obligations of the testator in the cases and to the extent prescribed by the CODE OF CIVIL PROCEDURE.

NOTE.—The three chapters comprising the Title on *Wills* embraces all the laws of our State relating to the subject not contained in Tit. XI of the Code of Civil Procedure; as also many of the provisions of the Civil Code of New York on the corresponding subject, from Sec. 614 to Sec. 636, inclusive. This somewhat enlarges the space occupied heretofore by our laws, but space is not to be considered when the provisions embodied are so salutary and so obviously well digested and prepared. Practical experience may demonstrate the usefulness of other provisions, but those given are supposed to provide for every conceivable contingency.

## TITLE VII.

### SUCCESSION.

SECTION 1384. Succession defined.

1385. Who first succeeds to possession of estates not devised, and for what purpose.

1386. Succession to and distribution of property.

1387. Illegitimate children to inherit in certain events.

1388. The mother is successor to illegitimate child.

1389. Degrees of kindred, how computed.

1390. Advancements constitute part of distributive share.

1391. Advancements, when too much, or not enough.

1392. What are advancements.

1393. Value of advancements, how determined.

1394. When heir advanced to dies before decedent.

1395. Inheritance of husband and wife from each other.

1396. Distribution of the common property in case of death of the wife.

1397. Distribution of common property on death of the husband.

1398. Inheritance by representation.

1399. Aliens may inherit, when and how.

1400. Succession not claimed, Attorney-General to cause to be sold, and proceeds deposited.

1401. When the property and estate escheat to the State.

1402. Property escheated subject to charges as other property.

1403. Successor liable for decedent's obligations.

Succession  
defined.

SEC. 1384. Succession is the coming in of another to take the property of one who dies without disposing of it by will.

NOTE.—For adopting the term "Succession," and discarding the more familiar expression, "Descents and distributions," used so long, an *apology*, if no *paramount reason* exists, is due from us. We have not, for the mere love of change, done anything; for it is better to adhere to everything tried and found *well enough*, unless a substantial reason exists for the change. It is not a matter of surprise that originally, in the preparation of all our laws, a similitude existed between ours and those of our mother country; yet our governments and system of laws, if not entirely, are greatly, different. Then as we progress in the perfection of our own system, it is expected that we shall become more and more "*sui generis*." The following reasons for the change are given by the New York Code Commissioners, and are deemed sufficient:

"The term 'descent,' hitherto chiefly used in this State to denote the devolution of an inheritance, was derived from the ancient principle of the English law, that an inheritance could never ascend or pass from son to father, but must descend or pass to descendants. But as the American law allows property to pass in both ways, there arises an incongruity in continuing this use of the term; an incongruity which causes practical embarrassment, since the word 'descendants' must still be confined to its strict meaning, and cannot embrace all those who may take by our statute of descents, so called, and the word 'descend' must often be used in the same view and in contradistinction to the devolution of property in the ascending line. The term 'succession' is the more appropriate phrase of the civil law, and this, already in common use among us, the Commissioners have adopted to denote the transmission of the property of a decedent by operation of law."

SEC. 1385. The property, both real and personal, of any one who dies without disposing of it by will, passes, in the first instance, to the personal representative who has qualified as his executor, administrator, or administrator with the will annexed, as the Trustee of such decedent—

Who first succeeds to possession of estates not devised, and for what purpose.

1. To make the provision for the surviving husband, or wife, or child, which is directed by Tit. XI, Part III, of the CODE OF CIVIL PROCEDURE.

2. To apply the property to the payment of the debts of the decedent, according to the Title on *Wills* and the provisions of the CODE OF CIVIL PROCEDURE; and,

3. To distribute any remaining property among those entitled to succeed to the property of the decedent, according to the provisions of this Title.

N. Y. C. C., Secs. 638-9, modified.

SEC. 1386. When any person having title to any estate not otherwise limited by marriage contract dies without disposing of the same by will, it is succeeded to, and must

Succession to and distribution property.

Succession  
to and dis-  
tribution of  
property.

be distributed, subject to the payment of his debts, in the following manner :

1. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation. If there be no child of the decedent living at his death, the remainder shall go to all of his lineal descendants ; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation.

2. If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife and to the decedent's father. If there be no father, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation ; if he leaves a mother also, she takes an equal share with the brothers and sisters. If decedent leaves no issue, or husband, or wife, the estate must go to his father.

3. If there be no issue, husband, wife or father, then in equal shares to the brothers and sisters of the decedent and to the children of any deceased brother or sister, by right of representation ; if a mother survives, she takes an equal share with the brothers and sisters.

4. If the decedent leaves no issue, husband, wife or father, and no brother or sister is living at the time of his death, the estate goes to his mother, to the exclusion of the issue, if any, of decedent's brothers or sisters.

5. If the decedent leaves a surviving husband or wife, and no issue, and no father, mother, brother or sister, the whole estate goes to the surviving husband or wife.

6. If the decedent leaves no issue, husband or wife, and no father, mother, brother or sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those

who claimed through the nearest ancestors must be preferred to those claiming through an ancestor more remote; however—

7. If the decedent leaves several children, or one child and the issue of one or more other children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

8. If, at the death of such child, who dies under age, not having been married, and all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent, descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation.

9. If the decedent leaves no husband, wife or kindred, the estate escheats to the State for the support of common schools.

Stats. 1850, 219, Sec. 1; 1862, 569, Sec. 1.

SEC. 1387. Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father

Illegitimate children to inherit in certain events.

and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate

Stats. 1850, 219, Sec. 2.

The mother  
is successor  
to illegiti-  
mate child.

Sec. 1388. If an illegitimate child dies intestate, without lawful issue, his estate descends to his mother, or, in case of her decease, to her heirs at law.

Stats. 1850, 220, Sec. 3.

Degrees of  
kindred, how  
computed.

Sec. 1389. The degrees of kindred must be computed according to the rules of the civil law, and kindred of the half blood inherit equally with those of the whole blood, in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

Stats. 1850, 221, Sec. 4.

Advance-  
ments con-  
stitute part  
of distribu-  
tive share

Sec. 1390. Any estate, real or personal, given by the decedent in his lifetime, as an advancement to any child, or other lineal descendant, is a part of the estate of the decedent for the purposes of division and distribution thereof among his issue, and must be taken by such child, or other lineal descendant, towards his share of the estate of the decedent.

Stats. 1850, 221, Sec. 5.

Advance-  
ments, when  
too much, or  
not enough.

Sec. 1391. If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent.

Stats. 1850, 221, Sec. 6.

What are  
advance-  
ments.

Sec. 1392. All gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir.

Stats. 1850, 221, Sec. 7.

**SEC. 1393.** If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value, in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained.

Value of advancements, how determined.

Stats. 1850, 221, Sec. 8.

**SEC. 1394.** If any child or other lineal descendant, receiving advancement, dies before the decedent, leaving issue, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly, by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them.

When heir advanced dies before decedent.

Stats. 1850, 221, Sec. 9.

**SEC. 1395.** The provisions of the preceding sections of this Title, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents.

Inheritance of husband and wife from each other.

Stats. 1850, 221, Sec. 10.

**SEC. 1396.** Upon the death of the wife, the entire common property, without administration, belongs to the surviving husband, if he shall not have abandoned and lived separate and apart from her; but if the husband shall have abandoned his wife, and lived separate and apart from her, the half of the common property, subject to the payment of the debts chargeable to the estate owned in common by the husband and wife, is at her testamentary disposition, and in the absence of such disposition, goes to her descendants or heirs at law, exclusive of her husband.

Distribution of the common property in case of death of the wife.

Stats. 1863-4, 363, Sec. 1.

**SEC. 1397.** Upon the death of the husband, one-half of the common property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise,

Distribution of common property on death of the husband.

according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire common property is equally subject to his debts, the family allowance, and the charges and expenses of administration.

Stats. 1863-4, 363, Sec. 1.

NOTE.—Before preparing the bill for the Legislature, Secs. 178 and 1274 must be thoroughly examined and made to harmonize, if they are found inconsistent.

Inheritance  
by repre-  
sentation.

SEC. 1398. Inheritance or succession "by right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents.

Stats. 1850, 221, Sec. 11.

Aliens may  
inherit,  
when and  
how.

SEC. 1399. Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this Title, is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.

Const., Art. I, Sec. 17; 1856, 137, Sec. 1; *State vs. Rogers*, 13 Cal., 159; N. Y. C. C., Sec. 660.

Succession  
not claimed,  
Attorney-  
General to  
cause to be  
sold, and  
proceeds de-  
posited.

SEC. 1400. When succession is not claimed as provided in the preceding section, the District Court, on information, must direct the Attorney-General to reduce the property to his or the possession of the State, or to cause the same to be sold, and the same or the proceeds thereof to be deposited in the State treasury for the benefit of such non-resident foreigner, or his legal representative, to be paid to him whenever, within five years after such deposit, proof to the satisfaction of the State Controller and Treasurer is produced that he is entitled to succeed thereto.

Stats. 1856, 137, Sec. 1.



**SEC. 1401.** When so claimed, the evidence and the joint order of the Controller and Treasurer must be filed by the Treasurer as his voucher, and the property delivered or the proceeds paid to the claimant on filing his receipt therefor. If no one succeeds to the estate or the proceeds, as herein provided, the property of the decedent devolves and escheats to the people of the State, and is placed by the State Treasurer to the credit of the School Fund.

When the property and estate escheat to the State.

Stats. 1856, 137, Sec. 1.

**SEC. 1402.** Real property passing to the State under the last section, whether held by the State or its officers, is subject to the same charges and trusts to which it would have been subject if it had passed by succession, and is also subject to all the provisions of Tit. VIII, Part III, of the CODE OF CIVIL PROCEDURE.

Property escheated subject to charges as other property.

Stats. 1870, 72, Sec. 1; 1862, 103, Sec. 2 *et seq.*; 1855, 222, Sec. 1 *et seq.*; N. Y. C. C., Sec. 668.

**SEC. 1403.** Those who succeed to the property of a decedent are liable for his obligations in the cases and to the extent prescribed by the CODE OF CIVIL PROCEDURE.

Successor liable for decedent's obligations.

N. Y. C. C., Sec. 669.

## TITLE VIII.

### MINES.

**SECTION 1409.** Injuring crops or buildings.

1410. Miners to give bonds.

1411. Construction of word "improvements."

1412. After crops are harvested, miners may work.

**NOTE.**—The statute (1855, 145) is such a hybrid specialty, and has been so much adjudicated upon, that no attempt is made to alter its phraseology. A chapter is needed, codifying the decisions of the Supreme Court into a few comprehensible sections, which should be made to harmonize with each other, and also with the fundamental rights which every citizen has in property when once acquired, whether in buildings, trees or crops. The penal section (Sec. 3) of the Act is, or ought to be, in the Penal Code.

**SEC. 1409.** No person shall, for mining purposes, destroy or injure any growing crops of grain or garden

Injuring crops or buildings.

vegetables growing upon the mineral lands of this State, nor undermine or injure any house, building, improvement or fruit trees, standing upon mineral lands, and the property of another, except as provided in this Title.

Miners to  
give bonds.

SEC. 1410. Whenever any person, for mining purposes, shall desire to occupy or use any mineral lands of this State, then occupied by such growing crops of grain, garden vegetables, fruit trees, houses, buildings or other improvements, property of another, such person shall first give bond to the owner of the growing crop, building, fruit trees or other improvement, to be approved by a Justice of the Peace of the township, with two or more sufficient sureties, in a sum to be fixed by three disinterested citizens, householders of the township, one to be selected by the obligor, one by the obligee, and one by a Justice of the Peace of the township, conditioned that the obligor shall pay to the obligee any and all damages which said obligee may sustain in consequence of the destruction by the obligor, or those in his employ, of the growing crops, fruit trees, improvements or buildings of the obligee.

Construction  
of word  
"improvements."

SEC. 1411. The word "improvements," in this Title, shall be construed to mean any superstructure on said farm, ranch or garden, and nothing more.

After crops  
are harvest-  
ed, miners  
may work.

SEC. 1412. Nothing in this Title shall prevent miners from working any mineral lands in the State, after the growing crops on the same are harvested.

## **DIVISION THIRD.**

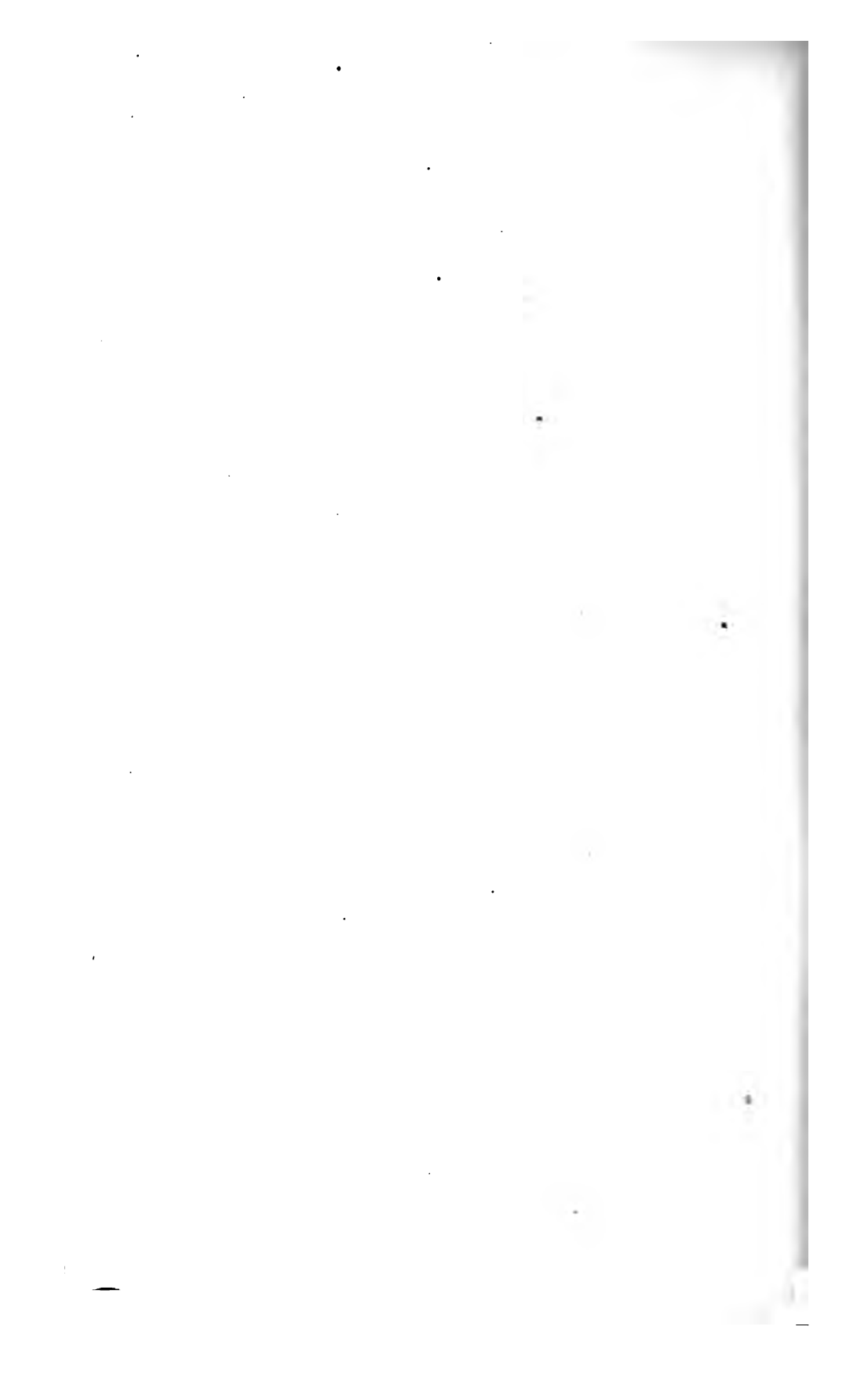
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**PART I. OBLIGATIONS IN GENERAL.**

**II. CONTRACTS.**

**III. OBLIGATIONS IMPOSED BY LAW.**

**IV. OBLIGATIONS ARISING FROM PARTICULAR TRANSACTIONS.**



# PART I.

## OBLIGATIONS IN GENERAL.

- TITLE I. DEFINITION OF OBLIGATIONS.
- II. INTERPRETATION OF OBLIGATIONS
- III. TRANSFER OF OBLIGATIONS.
- IV. EXTINCTION OF OBLIGATIONS.

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## TITLE I.

### DEFINITION OF OBLIGATIONS.

SECTION 1418. Obligation, what.  
1419. How created.

SEC. 1418. An obligation is a legal duty, by which a person is bound to do or not to do a certain thing. Obligation, what.

N. Y. C. C., Sec. 670.

SEC. 1419. An obligation arises either from—

How created

1. The contract of the parties; or,
2. The operation of law.

N. Y. C. C., Sec. 671.

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## TITLE II.

### INTERPRETATION OF OBLIGATIONS.

- CHAPTER I. GENERAL RULES OF INTERPRETATION.
- II. JOINT OR SEVERAL OBLIGATIONS.
- III. CONDITIONAL OBLIGATIONS.
- IV. ALTERNATIVE OBLIGATIONS.

## CHAPTER I.

## GENERAL RULES OF INTERPRETATION.

## SECTION 1423. General rules.

General  
rules.

SEC. 1423. The rules which govern the interpretation of contracts are prescribed by Part II of this Division. Other obligations are interpreted by the same rules by which statutes of a similar nature are interpreted.

Obligations may be divided into three classes, arising respectively out of contract, common law or statute. Those which are imposed by the common law explain themselves, their interpretation being a part of their essential nature. Contracts are interpreted by rules which differ materially from the rules governing the interpretation of statutes, and the two sets of rules, therefore, cannot well be united in one chapter.

N. Y. C. C., Sec. 672.

## CHAPTER II.

## JOINT OR SEVERAL OBLIGATIONS.

## SECTION 1427. Obligations, joint or several, etc.

## 1428. When joint.

## 1429. Contribution between joint parties.

Obligations,  
joint or sev-  
eral, etc.

SEC. 1427. An obligation imposed upon several persons, or a right created in favor of several persons, may be—

1. Joint.
2. Several; or,
3. Joint and several.

N. Y. C. C., Sec. 673.

When joint.

SEC. 1428. An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except in the special cases mentioned in the Title on the *Interpretation of Contracts*. This presumption, in the case of a right, can be overcome only by express words to the contrary.

N. Y. C. C., Sec. 674.

Contribution  
between  
joint parties.

SEC. 1429. A party to a joint or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.

The three following sections should be inserted in the Code of Civil Procedure :

" Sec. —. A joint obligation cannot be enforced at any time against any of the parties jointly liable, unless it is at the same time, and by the same proceeding, enforced against all.

" Sec. —. A joint and several obligation cannot be enforced by one proceeding against more than one of the promisers, unless it is by the same proceeding enforced against all. But it may be enforced against each of them successively, until satisfied by one of them.

" Sec. —. A joint and several right can be enforced only once, and either by one party only, or by all."

N. Y. C. C., Sec. 675.

### CHAPTER III.

#### CONDITIONAL OBLIGATIONS.

SECTION 1434. Obligation, when conditional.

1435. Conditions, kinds of.

1436. Conditions precedent.

1437. Conditions concurrent.

1438. Condition subsequent.

1439. Performance, etc., of conditions, when essential.

1440. When performance, etc., excused.

1441. Impossible or unlawful conditions void.

1442. Conditions involving forfeiture, how construed.

SEC. 1434. An obligation is conditional, when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.

Obligation,  
when con-  
ditional.

N. Y. C. C., Sec. 676.

SEC. 1435. Conditions may be precedent, concurrent or subsequent.

Conditions.  
kinds of.

N. Y. C. C., Sec. 677.

SEC. 1436. A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed.

Conditions  
precedent.

N. Y. C. C., Sec. 678.

SEC. 1437. Conditions concurrent are those which are mutually dependent, and are to be performed at the same time.

Conditions  
concurrent.

N. Y. C. C., Sec. 679.

SEC. 1438. A condition subsequent is one referring to a future event, upon the happening of which the obliga-

Condition  
subsequent.

tion becomes no longer binding upon the other party, if he chooses to avail himself of the condition.

N. Y. C. C., Sec. 680.

Performance, etc., of conditions, when essential.

SEC. 1439. Before any party to an obligation can require another party to perform any act under it, he must fulfil all conditions precedent thereto imposed upon himself; and must be able, and offer, to fulfil all conditions concurrent, so imposed upon him, on the like fulfilment by the other party, except as provided by the next section.

N. Y. C. C., Sec. 681.

When performance, etc., excused.

SEC. 1440. If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former party.

N. Y. C. C., Sec. 682.

Impossible or unlawful conditions void.

SEC. 1441. A condition in a contract, the fulfilment of which is impossible or unlawful, within the meaning of the article on the *Object of Contracts*, or which is repugnant to the nature of the interest created by the contract, is void.

N. Y. C. C., Sec. 683.

Conditions involving forfeiture, how construed.

SEC. 1442. A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created.

N. Y. C. C., Sec. 684.

## CHAPTER IV.

### ALTERNATIVE OBLIGATIONS.

SECTION 1448. Who has the right of selection.

1449. Right of selection, how lost.

1450. Alternatives indivisible.

1451. Nullity of one or more of alternative obligations.

Who has the right of selection.

SEC. 1448. If an obligation requires the performance of one of two acts, in the alternative, the party required



to perform has the right of selection, unless it is otherwise provided by the terms of the obligation.

N. Y. C. C., Sec. 685.

Sec. 1449. If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party.

Right of selection, how lost.

N. Y. C. C., Sec. 686.

Sec. 1450. The party having the right of selection between alternative acts must select one of them in its entirety, and cannot select part of one and part of another without the consent of the other party.

Alternatives indivisible.

N. Y. C. C., Sec. 687.

Sec. 1451. If one of the alternative acts required by an obligation is such as the law will not enforce, or becomes unlawful, or impossible of performance, the obligation is to be interpreted as though the other stood alone.

Nullity of one or more of alternative obligations.

N. Y. C. C., Sec. 688.

### TITLE III.

#### TRANSFER OF OBLIGATIONS.

Section 1457. Burden of obligation, not transferable.

1458. Rights arising out of obligation, transferable.

1459. Non-negotiable instruments may be transferred.

1460. Covenants running with land, what.

1461. What covenants run with land.

1462. Same.

1463. Same.

1464. What covenants run with land when assigns are named.

1465. Who are bound by covenants.

1466. Who are not.

1467. Apportionment of covenants.

Sec. 1457. The burden of an obligation may be transferred, with the consent of the party entitled to its benefit, but not otherwise, except as provided by Sec. 1466.

Burden of obligation, not transferable.

This is as true of covenants running with the land as of any other obligations. The original covenantor remains

liable to the covenantee, notwithstanding that the land passes into other hands (*House vs. Burr*, 24 Barb., 525; *Damb vs. Hoffman*, 3 N. D. Smith, 361; *Port vs. Jackson*, 17 Johns., 239, 479; *Jackson vs. Brownson*, 7 id., 227). So, where one has agreed to perform a service, he cannot compel the other party to accept the service from a third person and to release him therefrom (*Robson vs. Drummond*, 2 R. & Ad., 303). It is not meant by this section to imply that a third person cannot assume the obligations of a contract between other parties, but only that he cannot relieve a party thereto from his obligations, without the consent of the creditor.

N. Y. C. C., Sec. 689.

Rights arising out of obligation, transferable.

SEC. 1458. A right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such.

N. Y. C. C., Sec. 690.

Non-negotiable instruments may be transferred.

SEC. 1459. A non-negotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee; subject to all equities and defences existing in favor of the maker at the time of the indorsement.

[New section.]

NOTE.—This section supersedes the Act relative to bonds, due bills and other instruments in writing, passed April 20, 1850 (*Stats.* 1850, 332). The general provisions of this Code as to "Fraud," "Tender," "Diligence," "Failure of Consideration," etc., cover all the substantial requisites of this Act.

Covenants running with land, what.

SEC. 1460. Certain covenants, contained in grants of estates in real property, are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor, and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them. Such covenants are said to run with the land.

N. Y. C. C., Sec. 691.

What covenants run with land.

SEC. 1461. The only covenants which run with the land are those specified in this Title, and those which are incidental thereto.

N. Y. C. C., Sec. 692.

Same.

SEC. 1462. Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land.

N. Y. C. C., Sec. 693.

**Sec. 1463.** The last section includes covenants "of Same. warranty," "for quiet enjoyment," or for further assurance on the part of a grantor, and covenants for the payment of rent, or of taxes or assessments upon the land, on the part of a grantee.

N. Y. C. C., Sec. 694.

**NOTE.**—The first three covenants mentioned in this section ought to follow the fate of the covenant of seisin, which was originally held to "run with the land," but now held to be a personal covenant. The two last covenants and those described in the next section are properly the only real covenants made for the direct benefit of the property.

Code Covenants are classed as personal covenants by Sec. 1116 of this Code. See, also, note to Sec. 1112 of this Code.

**Sec. 1464.** A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.

What covenants run with land when assigns are named.

N. Y. C. C., Sec. 695.

**Sec. 1465.** A covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property.

Who are bound by covenants.

N. Y. C. C., Sec. 696.

**Sec. 1466.** No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits.

Who are not.

N. Y. C. C., Sec. 697.

**Sec. 1467.** Where several persons, holding by several titles, are subject to the burden or entitled to the benefit of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and if not, then according to their respective interests in point of quantity.

Apportionment of covenants.

N. Y. C. C., Sec. 698.

## TITLE IV.

## EXTINCTION OF OBLIGATIONS.

## CHAPTER I. PERFORMANCE.

## II. OFFER OF PERFORMANCE.

## III. PREVENTION OF PERFORMANCE OR OFFER.

## IV. ACCORD AND SATISFACTION.

## V. NOVATION.

## VI. RELEASE.

## CHAPTER I.

## PERFORMANCE.

## SECTION 1473. Obligation extinguished by performance.

1474. Performance by one of several joint debtors.

1475. Performance to one of joint creditors.

1476. Effect of directions by creditors.

1477. Partial performance.

1478. Payment, what.

1479. Application of general performance.

Obligation  
extinguished  
by perform-  
ance.

SEC. 1473. Full performance of an obligation, by the party whose duty it is to perform it, or by any other person on his behalf, and with his assent, if accepted by the creditor, extinguishes it.

N. Y. C. C., Sec. 699.

Performance  
by one of  
several joint  
debtors.

SEC. 1474. Performance of an obligation, by one of several persons who are jointly liable under it, extinguishes the liability of all.

N. Y. C. C., Sec. 700.

Performance  
to one of  
joint cred-  
itors.

SEC. 1475. An obligation in favor of several persons is extinguished by performance rendered to any of them, except in the case of a deposit made by owners in common, or in joint ownership, which is regulated by the Title on *Deposit*.

N. Y. C. C., Sec. 701.

Effect of  
directions by  
creditors.

SEC. 1476. If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though

the creditor does not receive the benefit of such performance.

N. Y. C. C., Sec. 702.

SEC. 1477. A partial performance of an indivisible obligation extinguishes a corresponding proportion thereof, if the benefit of such performance is voluntarily retained by the creditor, but not otherwise. If such partial performance is of such a nature that the creditor cannot avoid retaining it, without injuring his own property, his retention thereof is not presumed to be voluntary.

Partial performance.

N. Y. C. C., Sec. 703.

SEC. 1478. Performance of an obligation for the delivery of money only, is called payment.

Payment, what.

N. Y. C. C., Sec. 704.

SEC. 1479. Where a debtor, under several obligations to another, does an act, by way of performance, which is equally applicable to two or more of such obligations, such performance is applied as follows:

Application of general performance

1. If, at the time of performance, the intention or desire of the debtor that such performance should be applied to the extinction of any particular obligation, is manifested to the creditor, it is so applied.

2. If no such application is then made, the creditor, within a reasonable time after such performance, may apply it toward the extinction of any obligation, performance of which was due to him from the debtor at the time of such performance; except that if similar obligations were due to him both individually and as a trustee, he must, unless otherwise directed by the debtor, apply the performance to the extinction of all such obligations in equal proportion; and an application once made by the creditor cannot be rescinded without the consent of the debtor.

3. If neither party makes such application within the time prescribed herein, the performance is applied to the extinction of obligations in the following order; and, if there is more than one obligation of a particular class, to the extinction of all in that class, ratably:

(1.) Of an obligation due at the time of performance;

- (2.) Of an obligation not voidable at the option of the debtor;
- (3.) Of an obligation secured by a lien or collateral undertaking;
- (4.) Of interest;
- (5.) Of the obligation earliest in date of maturity;
- (6.) Of the obligation which it is most for the interest of the debtor to extinguish.

N. Y. C. C., Sec. 705.

## CHAPTER II.

### OFFER OF PERFORMANCE.

SECTION 1485. Obligation extinguished by offer of performance.

- 1486. Offer of partial performance.
- 1487. By whom to be made.
- 1488. To whom to be made.
- 1489. Where offer may be made.
- 1490. When offer must be made.
- 1491. Same.
- 1492. Compensation after delay in performance.
- 1493. Offer to be made in good faith.
- 1494. Conditional offer.
- 1495. Ability and willingness essential.
- 1496. Production of thing to be delivered, not necessary.
- 1497. Thing offered, to be kept separate.
- 1498. Performance of condition precedent.
- 1499. Written receipts.
- 1500. Extinction of pecuniary obligation.
- 1501. Objections to mode of offer.
- 1502. Title to thing offered.
- 1503. Custody of thing offered.
- 1504. Effect of offer on accessories of obligation.
- 1505. Creditor's retention of thing which he refuses to accept.

Obligation  
extinguished  
by offer of  
performance

SEC. 1485. An obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with intent to extinguish the obligation.

This is the present law with respect to all obligations other than for the payment of money (*Des Arts vs. Leggett*, 16 N. Y., 582; *Billings vs. Vanderbeck*, 23 Barb., 546; *Slingerland vs. Morse*, 8 Johns., 474). It is not now the law as to pecuniary obligations, the debtor having no power to rid himself of the debt without the consent of the creditor (see *Dixon vs. Clark*, 5 C. B., 365, 377; *Waistell vs. Atkinson*, 3 Bing., 290; *Kortwright vs. Cady*, 23 Barb., 490; 21 N. Y., 343).

N. Y. C. C., Sec. 706.

**SEC. 1486.** An offer of partial performance is of no effect. Offer of partial performance.  
 N. Y. C. C., Sec. 707.

**SEC. 1487.** An offer of performance must be made by the debtor, or by some person on his behalf and with his assent. By whom to be made.

N. Y. C. C., Sec. 708.

**SEC. 1488.** An offer of performance must be made to the creditor, or to any one of two or more joint creditors, or to a person authorized by one or more of them to receive or collect what is due under the obligation, if such creditor or authorized person is present at the place where the offer may be made; and if not, then to a Notary Public. To whom to be made.

N. Y. C. C., Sec. 709.

**SEC. 1489.** In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor— Where offer may be made

1. At any place appointed by the creditor; or,
2. Wherever the person to whom the offer ought to be made can be found; or,
3. If such person cannot, with reasonable diligence, be found within this State, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can, with reasonable diligence, be found within the State; or,
4. If this cannot be done, then at any place within this State.

N. Y. C. C., Sec. 710.

**SEC. 1490.** Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards. When offer must be made.

N. Y. C. C., Sec. 711.

**SEC. 1491.** Where an obligation does not fix the time for its performance, an offer of performance may be made at any time before the debtor, upon a reasonable demand, has refused to perform. Same.

N. Y. C. C., Sec. 712.

**SEC. 1492.** Where delay in performance is capable of exact and entire compensation, and time has not been ex- Compensation after delay in performance.

pressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime.

This provision, which is new, is intended to obviate the difficulties which constantly arise in determining whether time is of the essence of a contract or not.

This provision [offer of compensation] is also new. But as such tender is permitted by statute after an action has been commenced (2 R. S., 554, Sec. 20), it clearly ought to be allowed before any litigation is had, to stop interest and avoid costs. Undoubtedly it is not allowed by the common law (*Poole vs. Tumbridge*, 2 M. & W., 223; *Hume vs. Pepploe*, 8 East, 168); but the Judges acknowledged the hardship of the law on this point. In Connecticut the rule here proposed has become law through usage (*Tracy vs. Strong*, 2 Conn., 659).

N. Y. C. C., Sec. 713.

Offer to be made in good faith.

SEC. 1493. An offer of performance must be made in good faith, and in such manner as is most likely, under the circumstances, to benefit the creditor.

N. Y. C. C., Sec. 714.

Conditional offer.

SEC. 1494. An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform.

N. Y. C. C., Sec. 715.

Ability and willingness essential.

SEC. 1495. An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer.

All the precedents assume this to be essential. Ability, however, and not readiness, is the true test. If a debtor knows that his creditor will not accept performance, he should not be required to prepare anything for delivery, at a useless cost of time and trouble.

N. Y. C. C., Sec. 716.

Production of thing to be delivered, not necessary.

SEC. 1496. The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted.

This is an innovation upon the common law, as far as obligations for the payment of money (*Bakeman vs. Pooler*, 15 Wend., 637; *Hornby vs. Cramer*, 12 How. Pr., 491; *Finch vs. Brook*, 1 Bing. N. C., 253), or for the delivery of a written instrument (see *Brooklyn Bank vs. Degraw*, 23 Wend., 342), are concerned. But the present rule seems useless. In respect to bulky articles, this section is in conformity with the common law (*Slingerland vs. Morse*, 8 Johns., 474; *Myers vs. Davis*, 26 Barb., 367; *Coit vs. Houston*, 3 Johns. Cas., 243).

N. Y. C. C., Sec. 717.



Sec. 1497. A thing, when offered by way of performance, must not be mixed with other things from which it cannot be separated immediately and without difficulty.

Thing offered, to be kept separate.

N. Y. C. C., Sec. 718.

Sec. 1498. When a debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer to depend upon the due performance of such condition.

Performance of condition precedent.

N. Y. C. C., Sec. 719.

Sec. 1499. A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation.

Written receipts.

This provision is new. Its propriety should seem scarcely to admit of doubt.

N. Y. C. C., Sec. 720.

Sec. 1500. An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank of deposit within this State, of good repute, and notice thereof is given to the creditor.

Extinction of pecuniary obligation.

This is contrary to the present law upon this subject, which makes a tender operative only so far as to stop interest. The same rule has been applied to obligations for the delivery of deeds and other instruments (*Brooklyn Bank vs. De Grauw*, 23 Wend., 342). But this has been wisely overruled (*Des Arts vs. Leggett*, 16 N. Y., 582). The provision of this section have long been the law, in substance, of Louisiana and France. It seems to the Commissioners to be all that creditors can reasonably ask. The common law compels a debtor to keep the money which he owes, at his own risk. This is often an inconvenience, and sometimes a positive loss to him.

N. Y. C. C., Sec. 721.

Sec. 1501. All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated.

Objections to mode of offer.

N. Y. C. C., Sec. 722.

Sec. 1502. The title to a thing duly offered in performance of an obligation passes to the creditor, if the debtor at the time signifies his intention to that effect.

Title to thing offered

*Des Arts vs. Leggett*, 16 N. Y., 582; *Lamb vs. Lathrop*, 13 Wend., 95; *Rix vs. Strong*, 1 Root, 55; see *Smith vs.*

Loomis, 7 Conn., 110. At present this rule does not apply to money, but that is because a tender does not extinguish a pecuniary debt. The change proposed by Sec. 721 removes the ground of this distinction.

N. Y. C. C., Sec. 723.

NOTE.—See Sec. 1500 of this Code.

Custody  
of thing  
offered.

SEC. 1503. The person offering a thing, other than money, by way of performance, must, if he means to treat it as belonging to the creditor, retain it as a depositary for hire, until the creditor accepts it, or until he has given reasonable notice to the creditor that he will retain it no longer, and, if with reasonable diligence he can find a suitable depositary therefor, until he has deposited it with such person.

N. Y. C. C., Sec. 724.

Effect of  
offer on  
accessories  
of obligation

SEC. 1504. An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof.

N. Y. C. C., Sec. 725.

Creditor's  
retention of  
thing which  
he refuses to  
accept.

SEC. 1505. If anything is given to a creditor by way of performance, which he refuses to accept as such, he is not bound to return it without demand; but if he retains it, he is a gratuitous depositary thereof.

N. Y. C. C., Sec. 726.

### CHAPTER III.

#### PREVENTION OF PERFORMANCE OR OFFER.

SECTION 1511. What excuses performance, etc.

1512. Effect of prevention of performance.

1513. Same.

1514. Same.

1515. Effect of refusal to accept performance before offer.

What ex-  
cuses per-  
formance,  
etc.

SEC. 1511. The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse.

2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this State or of the United States, unless the parties have expressly agreed to the contrary; or,

3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time.

N. Y. C. C., Sec. 727.

SEC. 1512. If performance of an obligation is prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained by its performance on both sides.

Effect of prevention of performance.

N. Y. C. C., Sec. 728.

SEC. 1513. If a debtor is dissuaded by his creditor from performance, but is not actually forbidden to perform, he may, at his option, omit to perform, and retain whatever he has received under the contract, but he is entitled to nothing more.

Same.

N. Y. C. C., Sec. 729.

SEC. 1514. If performance of an obligation is prevented by any cause excusing performance, other than the act of the creditor, the debtor is entitled to a ratable proportion of the consideration to which he would have been entitled upon full performance, according to the benefit which the creditor receives from the actual performance.

Same.

N. Y. C. C., Sec. 730.

SEC. 1515. A refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal, unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it.

Effect of refusal to accept performance before offer.

N. Y. C. C., Sec. 731.

## CHAPTER IV.

## ACCORD AND SATISFACTION.

SECTION 1521. Accord, what.

1522. Effect of accord.

1523. Satisfaction, what.

1524. Accord of liquidated debt.

Accord,  
what.

SEC. 1521. An accord is an agreement to accept, in extinction of an obligation, something to which the person agreeing to accept is not otherwise entitled.

N. Y. C. C., Sec. 732.

Effect of  
accord.

SEC. 1522. Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed.

N. Y. C. C., Sec. 733.

Satisfaction,  
what.

SEC. 1523. Acceptance, by the creditor, of the consideration of an accord, extinguishes the obligation, and is called satisfaction.

Hall vs. Flookton, 16 Q. B., 1039; Jones vs. Sawkins, 5 C. B., 142. Though an accord and satisfaction is not at common law a defence to a claim founded upon a record or specialty (Mitchell vs. Hawley, 4 Den., 414), the Commissioners do not think it wise to retain this distinction.

N. Y. C. C., Sec. 734.

NOTE.—Sealed instruments are abolished by this Code, (Sec. 1096.) A *specialty* referred to in the above note of the New York revisers is by our Sec. 1096 on the same footing with simple contracts.

Accord of  
liquidated  
debt.

SEC. 1524. Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, and rendered in pursuance of an agreement for that purpose, though without any new consideration, extinguishes the obligation.

Stats. 1868, 31.

NOTE.—This section is the alternate section or "substitute," proposed by the New York Commission. The section of their text (Sec. 735) and its note are as follows:

SEC. 735. Payment of an amount less than that of a liquidated debt then payable, is not a satisfaction thereof, though accepted as such.

"Palmerston vs. Huxford, 4 Denio, 166; Neary vs. Bostwick, 2 Hilt., 514; see Evans vs. Powis, 1 Exch., 601; Wilkinson vs. Byers, 1 Ad. & El., 106; Brooks vs. White, 3 Metc., 286; Goodnow vs. Smith, 18 Pick., 414; Smith vs. Brown, 3 Hawks, 580; Von Gerhard vs. Light, 13 Abb.

Pr., 101; *Harrison vs. Wilcox*, 2 Johns, 448; *Dederick vs. Leman*, 9 id., 333; *Scott vs. Hunt*, 2 How. Pr., 58; *Down vs. Hatcher*, 10 Ad. & El., 121; *Thomas vs. Heathorn*, 2 B. & C., 477; *Fitch vs. Sutton*, 5 East, 230; *Cumber vs. Wane*, 1 Str., 426. This rule of the common law is not founded upon natural justice, nor can it be supported upon any other than technical grounds. An agreement to accept a barrel of flour in satisfaction of a debt of \$1,000 is valid, and if the flour is delivered the debt is satisfied. So a release under seal, without any consideration, extinguishes the debt. But an agreement to accept \$999 in satisfaction of the debt is unavailing, and the obligation to pay the other dollar is unimpaired. In Pennsylvania, the rule has been disavowed for over thirty years past (*Milliken vs. Brown*, 1 Rawle, 391). It has been abolished in Maine, by statute (*Laws 1851*, ch. 213). The Commissioners recommend the omission of this section, and the insertion of the following substitute."

## CHAPTER V.

### NOVATION.

SECTION 1530. Novation, what.

1531. Modes of novation.

1532. Consideration for novation presumed, when.

1533. Intent presumed.

1534. Completed novation operates, how.

1535. Novation a contract.

1536. Rescission of novation.

SEC. 1530. Novation is the substitution of a new obligation for an existing one. Novation,  
what.

N. Y. C. C., Sec. 736.

SEC. 1531. Novation is made—

Modes of  
novation.

1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation.
2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,
3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.

N. Y. C. C., Sec. 737.

NOTE.—This section, from the New York Code, is modified by omitting the words "and higher" after the word "new," in the first subdivision. All distinction between sealed and unsealed instruments is abolished. See Sec. 1096 of this Code.

Consideration for novation presumed, when

SEC. 1532. The old obligation, the mutual relation of the parties and the mutual advantages expectant from the new obligation, constitute a sufficient consideration to support novation.

[New section.]

NOTE.—The following is Sec. 739 of the New York Civil Code:

"SEC. 739. The acceptance, by a creditor, of a new obligation of the debtor for the payment of money only, in satisfaction of another obligation of as high degree, for the payment of a specific sum of money only, then payable, does not extinguish the latter obligation (unless accepted as a satisfaction under Sec. 735), but extends the time of payment until the new obligation becomes payable."

We have adopted the New York alternate for their Sec. 735. If the parties agree that a new obligation should satisfy an old one for the same debt, why should the law interfere? Is not the old obligation sufficient consideration to support the new one?

Intent presumed.

SEC. 1533. When the new contract is made, the intent mentioned in Sec. 1551 is presumed, until the contrary appears, or unless such presumption operates to discharge an encumbrance, security or surety.

[New section.]

Completed novation operates, how

SEC. 1534. When novation is complete it operates as satisfaction of the pre-existing obligation.

[New section.]

Novation a contract.

SEC. 1535. Novation is made by contract, and is subject to all the rules concerning contracts in general.

N. Y. C. C., Sec. 738.

Rescission of novation.

SEC. 1536. When the obligation of a third person, or an order upon such person, is accepted in satisfaction, the creditor may rescind such acceptance, if the debtor prevents such person from complying with the order, or from fulfilling the obligation; or if, before the creditor can, with reasonable diligence, reach such person, he becomes insolvent.

N. Y. C. C., Sec. 740.

## CHAPTER VI.

### RELEASE.

SECTION 1541. Obligation extinguished by release.

1542. Certain claims not affected by general release.

1543. Release of several joint debtors.

SEC. 1541. An obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration.

Obligation  
extinguished  
by release.

A release under seal extinguishes the debt, notwithstanding the provision of the Revised Statutes, allowing the want of consideration for a sealed instrument to be shown (*Stearns vs. Tappin*, 5 Buer, 294). But by the present law, a release, with neither a seal nor a new consideration, is void (*Von Gerhard vs. Lighte*, 13 Abb. Pr., 101; *Seymour vs. Minturn*, 17 Johns., 169; *Dewey vs. Derby*, 20 id., 462; *Jackson vs. Stackhouse*, 1 Cow., 122). The justice of its restrictions may well be doubted. The Commissioners recommend the substitution of the words "in writing" for "under seal."

N. Y. C. C., Sec. 741.

• NOTE.—See note to Sec. 1524 of this Code. In this instance, the New York section and note accords with our abolition of seals. (Stats. 1867, 31.)

SEC. 1542. A general release does not extend to claims which the creditor did not know or suspect to exist in his favor at the time of executing the release.

Certain  
claims not  
affected by  
general re-  
lease.

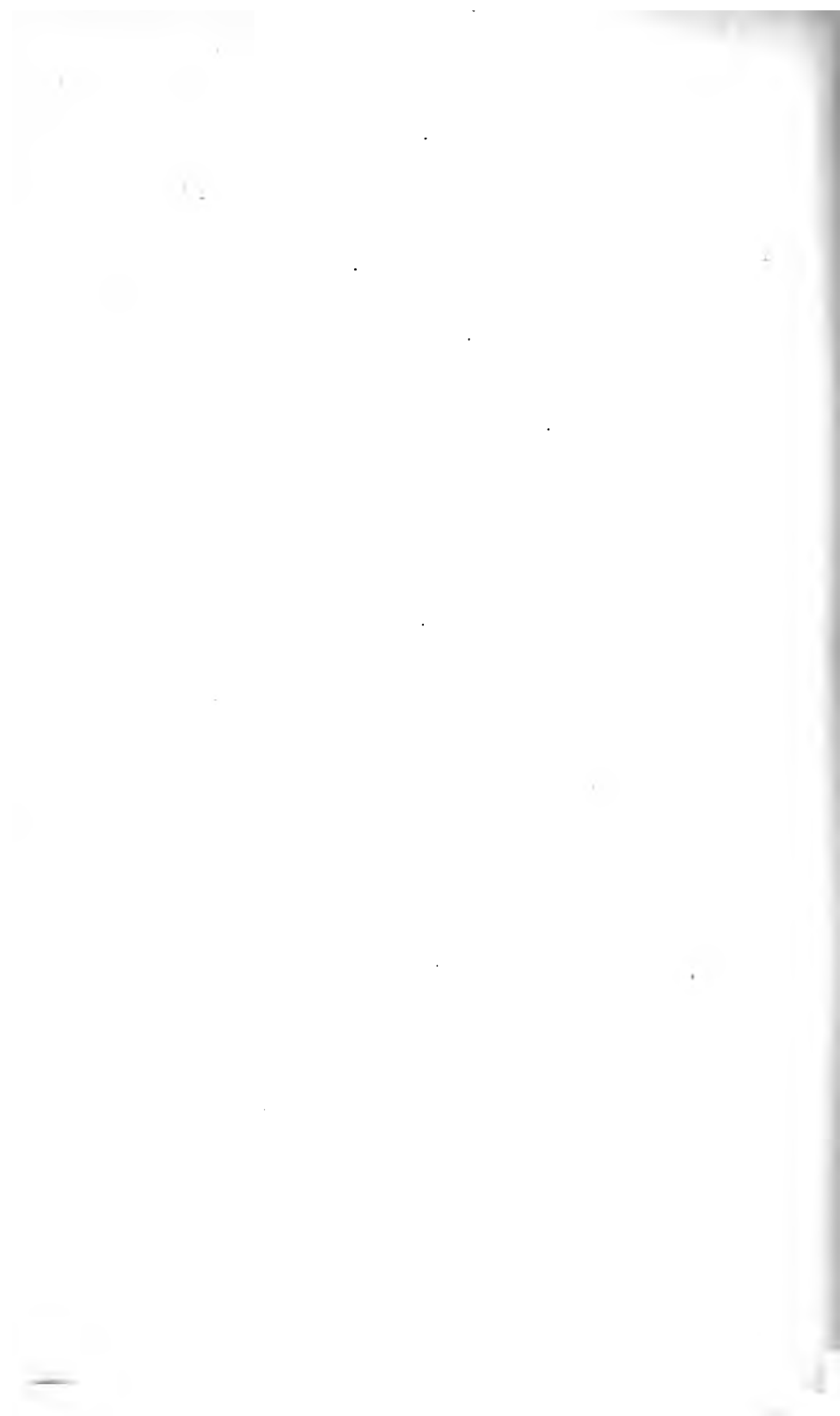
N. Y. C. C., Sec. 742.

SEC. 1543. A release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him.

Release of  
several joint  
debtors.

This provision is new (see *Cornell vs. Masten*, 35 Barb., 157; *Bronson vs. Fitzhugh*, 1 Hill, 185; *Hoffman vs. Dunlop*, 1 Barb., 185; *Parsons vs. Hughes*, 9 Paige, 591; *Catskill Bank vs. Messenger*, 9 Cow., 37; *Rowley vs. Stoddard*, 7 Johns., 207). By statute, a release may be so drawn as to discharge one only of several joint debtors (3 R. S. [5th ed.], 65; Laws 1838, Chap. 257); and as the intention of the creditor is evident enough from the form of the release, the justice of this provision can hardly be disputed.

N. Y. C. C., Sec. 743.





## PART II.

### CONTRACTS.

- TITLE I. NATURE OF A CONTRACT.
- II. MANNER OF CREATING CONTRACTS.
- III. INTERPRETATION OF CONTRACTS.
- IV. UNLAWFUL CONTRACTS.
- V. EXTINCTION OF CONTRACTS.

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### TITLE I.

#### NATURE OF A CONTRACT.

- CHAPTER I. DEFINITION.
- II. PARTIES.
- III. CONSENT.
- IV. OBJECT.
- V. CONSIDERATION.

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### CHAPTER I.

#### DEFINITION.

SECTION 1549. Contract, what.

1550. Essential elements of contract.

SEC. 1549. A contract is an agreement to do or not to do a certain thing. Contract, what.

N. Y. C. C., Sec. 744.

SEC. 1550. It is essential to the existence of a contract that there should be— Essential elements of contract.

1. Parties capable of contracting.
2. Their consent.
3. A lawful object; and,
4. A sufficient cause or consideration.

The word "object" has been selected, after much reflection, as a more correct word, for the purpose here intended, than "subject" or "subject matter."

N. Y. C. C., Sec. 745.

## CHAPTER II.

### PARTIES.

SECTION 1556. Who may contract.

1557. Minors, etc.

1558. Identification of parties necessary.

1559. When contract for benefit of third person may be enforced.

Who may  
contract.

SEC. 1556. All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.

The disabilities of married women are entirely removed by Sec. 79.

N. Y. C. C., Sec. 748.

NOTE.—See Sec. 158 of this Code.

Minors, etc.

SEC. 1557. Minors, and persons of unsound mind, have only such capacity as is defined by Part I of Div. First of this Code.

N. Y. C. C., Sec. 747.

Identifica-  
tion of par-  
ties neces-  
sary.

SEC. 1558. It is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them.

N. Y. C. C., Sec. 748.

When con-  
tract for  
benefit of  
third person  
may be en-  
forced.

SEC. 1559. A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

N. Y. C. C., Sec. 749.

## CHAPTER III.

### CONSENT.

SECTION 1565. Essentials of consent.

1566. Consent, when voidable.

1567. Apparent consent, when not free.

1568. When deemed to have been obtained by fraud, etc.

1569. Duress, what.

1570. Menace, what.

## SECTION 1571. Fraud, actual or constructive.

1572. Actual fraud, what.

1573. Constructive fraud.

1574. Actual fraud a question of fact.

1575. Undue influence, what.

1576. Mistake, what.

1577. Mistake of fact.

1578. Mistake of law.

1579. Mistake of foreign laws.

1580. Mutuality of consent.

1581. Communication of consent.

1582. Mode of communicating acceptance of proposal.

1583. When communication deemed complete.

1584. Acceptance by performance of conditions.

1585. Acceptance must be absolute.

1586. Revocation of proposal.

1587. Revocation, how made.

1588. Ratification of contract, void for want of consent.

1589. Assumption of obligation by acceptance of benefits.

SEC. 1565. The consent of the parties to a contract must be— Essentials of consent.

1. Free.
2. Mutual; and,
3. Communicated by each to the other.

N. Y. C. C., Sec. 750.

SEC. 1566. A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties, in the manner prescribed by the chapter on *Rescission*. Consent, when void-able.

N. Y. C. C., Sec. 751.

SEC. 1567. An apparent consent is not real or free when obtained through— Apparent consent, when not free.

1. Duress.
2. Menace.
3. Fraud.
4. Undue influence; or,
5. Mistake.

Menace has usually been classed with duress, and will be found to be treated under that head in the digests. It is, however, clearly a separate branch of the subject. Accident and surprise are included under the head of "Mistake."

N. Y. C. C., Sec. 752.

SEC. 1568. Consent is deemed to have been obtained through one of the causes mentioned in the last section, only when it would not have been given had such cause not existed. When deemed to have been obtained by fraud, etc.

N. Y. C. C., Sec. 753.

Duress,  
what.

SEC. 1569. Duress consists in—

1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant or adopted child of such party, husband or wife.

2. Unlawful detention of the property of any such person; or,

3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harrassing or oppressive.

N. Y. C. C., Sec. 754.

Menace,  
what.

SEC. 1570. Menace consists in a threat—

1. Of such duress as is specified in Subds. 1 and 3 of the last section.

2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or,

3. Of injury to the character of any such person.

This [last] species of threat is not usually included in the definition of duress, and was doubtless not so treated under the old common law, when a libeller could be made to rot in jail until he paid damages, while neither the judgment creditor nor any one else was bound to find him food or drink (*Dive vs. Maningham*, 1 Plowd., 68); and when some debtors did actually starve to death. With such a savage remedy for the recovery of pecuniary damages, they might be considered an adequate satisfaction for injuries to property or character, and it was on this ground that such injuries were not regarded as duress (*Bac. Abr.*, Duress, A). The remedy now existing is less effective, even if money were considered equivalent to character. By statute, it is now a criminal offence to send threatening letters for the purpose of extorting money, and that which is thus treated as a crime ought not to be allowed to sustain a contract. These views are further sustained by *Story Cont.*, Sec. 398; 2 *Stark. Ev.*, 482; *Chitt. Cont.*, 208. And see *Eadie vs. Slimmon*, 26 N. Y., 9, in which some weight is given to the influence of a threat involving the loss of a husband's character.

N. Y. C. C., Sec. 755.

Fraud, actual or constructive

SEC. 1571. Fraud is either actual or constructive.

N. Y. C. C., Sec. 756.

Actual fraud, what.

SEC 1572. Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.

3. The suppression of that which is true, by one having knowledge or belief of the fact.

4. A promise, made without any intention of performing it; or,

5. Any other act fitted to deceive.

N. Y. C. C., Sec. 757.

SEC. 1573. Constructive fraud consists—

Constructive  
fraud.

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,

2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

N. Y. C. C., Sec. 758.

SEC. 1574. Actual fraud is always a question of fact.

Actual fraud  
a question  
of fact.

N. Y. C. C., Sec. 759.

SEC. 1575. Undue influence consists—

Undue influence,  
what.

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him.

2. In taking an unfair advantage of another's weakness of mind; or,

3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

*Note to Subd. 1.*—It may safely be stated as a general rule of equity, that no one can be permitted to make any selfish use of a personal confidence reposed in him. This rule is illustrated in a variety of forms, and sustained by numerous authorities, in the Title on *Trusts*. But it is also proper to be recognized in this place. It is not necessary, in such cases, to show that there was any deception practised. It is sufficient to show that the confidence reposed was taken advantage of for purposes of gain (see *Sears vs. Shafer*, 6 N. Y., 268, 272; *Bergen vs. Udall*, 31 Barb., 9; *Brook vs. Barnes*, 40 Barb., 521; *Baker vs. Bradley*, 7 De G., M. & G., 597; *Tyrrell vs. Bank of London*, 10 H. of L. Cas., 26; *Dent vs. Bennett*, 4 Myl. & Cr., 269; 7 Sim., 539; *Broun vs. Kennedy*, 9 Jur. [N. S.], 1163; *Davies vs. Davies*, id., 1002.)

A parent may not acquire anything from his child by the slightest exercise of parental authority (*Bury vs. Op-*

penheim, 26 Beav., 594; *Bergon vs. Udall*, 31 Barb., 2; *Taylor vs. Taylor*, 8 How. [U. S.], 183; *Baker vs. Bradley*, 7 De G., M. & G., 597; see *Broun vs. Kennedy*, 9 Jur. [N. S.], 1163; *Davies vs. Davies*, id., 1002; and the same rule applies to any one standing in the relation of a parent (*Archer vs. Hudson*, 7 Beav., 551), as an uncle with whom his niece lived for a number of years (id.), or an elder sister who had a great ascendancy over the mind of the grantor (*Harvey vs. Mount*, 8 Beav., 439). So a deed from a lady to a clergyman whom she believed to be inspired, was set aside (*Nottidge vs. Prince*, 2 Giff., 246).

Where agents, appointed by the Comptroller to investigate the condition of an insurance company which had applied to him, pursuant to statute, for leave to do business, after they had made their report, and had in fact no further power, insisted upon the payment of \$300 as fees, threatening to revoke their report if the fees were not paid, it was held that the money paid under such a threat might be recovered back (*Am. Ex. Fire Ins. Co. vs. Britton*, 8 Bosw., 148; see *Steele vs. Williams*, 8 Exch., 625; *Dew vs. Parsons*, 2 B. & Ald., 562; *Morgan vs. Palmer*, 2 B. & C., 729).

This is all that is necessary. Nothing more than a perverted use of the power of the party need be shown.

*Note to Subd. 2.*—*Longmate vs. Ledger*, 6 Jur. [N. S.], 481; *Blackford vs. Christian*, 1 Knapp, 77; see *Tracy vs. Sacket*, 1 Ohio St., 58; *Rippy vs. Grant*, 4 Ired. Eq., 443; *Whiteburn vs. Hines*, 1 Munf., 557; *Dunn vs. Chambers*, 4 Barb., 376.

*Note to Subd. 3.*—*Breck vs. Cole*, 4 Sandf., 88; *Bowes vs. Heaps*, 3 Ves. & B., 119; *Wood vs. Abrey*, 3 Madd., 423; *Gould vs. Okeden*, 4 Bro. P. C., 198; see *Cockshott vs. Bennet*, 2 T. R., 763; *Bernardiston vs. Lingood*, 2 Atk., 133; *Thornhill vs. Evans*, id., 330; *Walsley vs. Booth*, id., 28, 29; *Berney vs. Pitt*, 2 Vern., 14; *Nott vs. Hill*, id., 27; *Wiseman vs. Beake*, id., 121; *Roche vs. O'Brien*, 1 Ball & B., 337, 359; *Bromley vs. Smith*, 26 Beav., 564; 5 Jur. [N. S.], 837; *Lamplugh vs. Cox*, Dick, 411; *Heron vs. Heron*, 2 Atk., 160. These cases seem to support this view. They are generally classed under the head of fraud (see *Story Eq. Jur.*, Secs. 331-337); but the principle on which they depend is not a mere question of fraud.

N. Y. C. C., Sec. 760.

Mistake,  
what.

#### SEC. 1576. Mistake may be either of fact or law.

As to mistake of fact there is no question. Mistake of law has been often declared to be no ground for relief at law or in equity (see *Champlin vs. Laytin*, 13 Wend., 417; *Storrs vs. Parker*, 6 Johns. Ch., 166; *Lyon vs. Richmond*, 2 id., 61; *Kent vs. Manchester*, 29 Barb., 595; *Story, Eq. Jur.*, Secs. 111-139). But the contrary view has been taken by Judges of high authority (see *Champlin vs. Laytin*, 13 Wend., 422; *Many vs. Beekman Iron Co.*, 9 Paige, 188; *Stone vs. Godfrey*, 5 De G., M. & G., 90; *Broughton vs. Hutt*, 3 De G. & J., 501; *Evants vs. Strode*, 11 Ohio, 456. See, also, *Wheeler vs. Smith*, 9 How. [U. S.], 55). The Commissioners think that the latter cases are better considered. No doubt relief upon this ground must be granted with extreme caution, and in only a limited class of cases; but this by no means proves that such relief should never be granted.

N. Y. C. C., Sec. 761.

Mistake  
of fact.

#### SEC. 1577. Mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in—

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,

2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

N. Y. C. C., Sec. 762.

SEC. 1578. Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from—

Mistake of law.

1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.

*Note to Subd. 1.*—Many vs. Beekman Iron Co., 9 Paige, 188; Hall vs. Reed, 2 Barb. Ch., 501; see Pitcher vs. Turin Plank Road Co., 10 Barb., 436; Wake vs. Harrop, 6 H. & N., 768.

*Note to Subd. 2.*—In Cooke vs. Nathan (16 Barb., 342), it was held that a misrepresentation of the law by one party, upon which the other ignorantly relied, was a fraud. It seems to follow that a transaction such as is described in the text should be relieved against, as a mistake, if not as a fraud.

N. Y. C. C., Sec. 763.

SEC. 1579. Mistake of foreign laws is a mistake of fact.

Mistake of foreign laws.

N. Y. C. C., Sec. 764.

SEC. 1580. Consent is not mutual, unless the parties all agree upon the same thing in the same sense. But in certain cases defined by the chapter on *Interpretation*, they are to be deemed so to agree without regard to the fact.

Mutuality of consent.

N. Y. C. C., Sec. 765.

SEC. 1581. Consent can be communicated with effect, only by some act or omission of the party contracting, by which he intends to communicate it, or which necessarily tends to such communication.

Communication of consent.

This is intended to exclude the possible case of a declaration of consent made to a person having no interest in the contract, and communicated by him to the other party without authority.

N. Y. C. C., Sec. 766.

SEC. 1582. If a proposal prescribes any conditions concerning the communication of its acceptance, the pro-

Mode of communicating acceptance of proposal.

poser is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted.

N. Y. C. C., Sec. 767.

When communication deemed complete.

SEC. 1583. Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section.

This section is intended to recognize the rule that consent is complete as soon as a letter of acceptance is put into the Post-office.

N. Y. C. C., Sec. 768.

Acceptance by performance of conditions.

SEC. 1584. Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal.

N. Y. C. C., Sec. 769.

Acceptance must be absolute.

SEC. 1585. An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character, which the proposer can separate from the rest, and which will conclude the person accepting. A qualified acceptance is a new proposal.

N. Y. C. C., Sec. 770.

Revocation of proposal.

SEC. 1586. A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.

N. Y. C. C., Sec. 771.

Revocation, how made.

SEC. 1587. A proposal is revoked—

1. By the communication of notice of revocation by the proposer to the other party, in the manner prescribed by Secs. 1581 and 1583, before his acceptance has been communicated to the former.

2 By the lapse of the time prescribed in such proposal for its acceptance, or if no time is so prescribed, the lapse of a reasonable time without communication of the acceptance.

3. By the failure of the acceptor to fulfil a condition precedent to acceptance; or,

4. By the death or insanity of the proposer.

N. Y. C. C., Sec. 772.



SEC. 1588. A contract which is voidable solely for want of due consent, may be ratified by a subsequent consent.

Ratification of contract, void for want of consent.

N. Y. C. C., Sec. 773.

SEC. 1589. A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.

Assumption of obligation by acceptance of benefits.

N. Y. C. C., Sec. 774; *Bennett vs. Judson*, 21 N. Y., 238.

## CHAPTER IV.

### OBJECT OF A CONTRACT.

SECTION 1595. Object, what.

1596. Requisites of object.

1597. Impossibility, what.

1598. When contract wholly void.

1599. When contract partially void.

SEC. 1595. The object of a contract is the thing which it is agreed, on the part of the party receiving the consideration, to do or not to do.

Object, what.

N. Y. C. C., Sec. 775; *Martin vs. McCormick*, 8 N. Y., 335.

SEC. 1596. The object of a contract must be lawful when the contract is made, and possible and ascertainable by the time the contract is to be performed.

Requisites of object.

N. Y. C. C., Sec. 776.

NOTE.—For a definition of the word "lawful," see Chap. V, of this Title.

SEC. 1597. Everything is deemed possible, except that which is impossible in the nature of things.

Impossibility, what.

Impossibility is to be determined, not by the means or ability of the party, but by the nature of things (Code La., 1885, 2028; see *McNeill vs. Reed*, 9 Bing., 68; *Beebe vs. Johnson*, 19 Wend., 500; *Harmony vs. Bingham*, 12 N. Y., 99; *Warfield vs. Watkins*, 30 Barb., 395; *Tufnell vs. Constable*, 7 Ad. & El., 798). Thus a promise to procure the assent of a third person to any lawful and proper act is valid (*Lloyd vs. Crispe*, 5 Taunt., 249; *McNeill vs. Reed*, 9 Bing., 68).

N. Y. C. C., Sec. 777.

SEC. 1598. Where a contract has but a single object, and such object is unlawful, whether in whole or in part,

When contract wholly void.

or wholly impossible of performance, or so vaguely expressed as to be wholly unascertainable, the entire contract is void.

N. Y. C. C., Sec. 778.

When contract partially void.

SEC. 1599. Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful in whole or in part, the contract is void as to the latter and valid as to the rest.

N. Y. C. C., Sec. 779.

## CHAPTER V.

### CONSIDERATION.

SECTION 1605. Good consideration, what.

1606. How far legal or moral obligation is a good consideration.

1607. Consideration lawful.

1608. Effect of its illegality.

1609. Consideration executed or executory.

1610. Executory consideration.

1611. How ascertained.

1612. Effect of impossibility of ascertaining consideration.

1613. Same.

Good consideration, what

SEC. 1605. Any benefit conferred, or agreed to be conferred, upon the promiser, by any other person, to which the promiser is not lawfully entitled; or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promiser, is a good consideration for a promise.

N. Y. C. C., Sec. 780.

How far legal or moral obligation is a good consideration.

SEC. 1606. An existing legal obligation resting upon the promiser, or a moral obligation originating in some benefit conferred upon the promiser, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.

The common law does not recognize moral obligations, except in a few cases, as sufficient to sustain a promise (Nash vs. Russell, 5 Barb., 556; Geer vs. Archer, 2 Barb., 420; Watkins vs. Halstead, 2 Sandf., 311; Ehle vs. Judson, 24 Wend., 97; Smith vs. Ware, 13 Johns., 257; Beaumont vs. Reeve, 8 Q. B., 483; Eastwood vs. Kenyon, 11 Ad. & El., 438. But see, to the contrary, Doty vs. Brown, 14 Johns., 381; Lee vs. Muggeridge, 5 Taunt., 36). The

authorities, however, entirely fail to establish any satisfactory principle upon which to distinguish between the different species of moral obligations. Thus, in *Bunn vs. Winthrop* (1 Johns. Ch., 329), past seduction was held a good consideration to support a grant. In *Beaumont vs. Reeve* (8 Q. B., 483) the same consideration was held insufficient to support a promise. In *Goulding vs. Davidson* (28 Barb., 438), it is said that there must have been, at some time, an actual legal obligation. Yet in *Rice vs. Welling* (5 Wend., 595) and *Early vs. Mahon* (19 Johns., 147), the original contract was usurious, and therefore void from the beginning. The same may be said of promises to pay debts contracted in infancy, which are held valid. *Goulding vs. Davidson* was reversed (26 N. Y., 604). The rule stated in the text seems to the Commissioners to be just, and to be, on the whole, as easily reconcilable with the authorities in this State as any other that can be devised.

N. Y. C. C., Sec. 781.

SEC. 1607. The consideration of a contract must be lawful within the meaning of Sec. 1667.

Consideration lawful.

N. Y. C. C., Sec. 782.

SEC. 1608. If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void.

Effect of its illegality.

This principle is deducible from all the cases taken together, though not to be found thus stated in any one case. Thus, there is no doubt that, if the consideration is single, or in other words indivisible, its partial illegality is fatal to the contract (*Mills vs. Mills*, 36 Barb., 474; *Rose vs. Truax*, 21 id., 361; *Pepper vs. Haight*, 20 id., 429; *Barton vs. Port Jackson Plank Road Co.*, 17 id., 397; *Burt vs. Place*, 8 Cow., 431; see *Brown vs. Brown*, 34 Barb., 533; *Porter vs. Havens*, 37 id., 343). The limitations of the rules are conformable to the principle of Secs. 778 and 779.

N. Y. C. C., Sec. 783.

SEC. 1609. A consideration may be executed or executory, in whole or in part. In so far as it is executory, it is subject to the provisions of Chap. IV of this Title.

Consideration executed or executory.

N. Y. C. C., Sec. 784.

SEC. 1610. When a consideration is executory, it is not indispensable that the contract should specify its amount or the means of ascertaining it. It may be left to the decision of a third person, or regulated by any specified standard.

Executory consideration.

There is perhaps no precedent for a general provision of this kind [specified standard] under the head of contracts. But finding it necessary to repeat the same section, almost word for word, under the various heads of Sale, Hire, Employment, Deposit, Carriage and Insurance, and perceiving no reason why it could work injustice if applied to other contracts, although in practice it probably is not needed for them, the Commissioners have ventured to transfer it to this part of the Code; to which, they think, it properly belongs.

N. Y. C. C., Sec. 785.

How ascer-  
tained.

SEC. 1611. When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth.

N. Y. C. C., Sec. 786.

Effect of im-  
possibility  
of ascertain-  
ing consid-  
eration.

SEC. 1612. Where a contract provides an exclusive method by which its consideration is to be ascertained, which method is on its face impossible of execution, the entire contract is void.

N. Y. C. C., Sec. 787.

Same.

SEC. 1613. Where a contract provides an exclusive method by which its consideration is to be ascertained, which method appears possible on its face, but in fact is, or becomes, impossible of execution, such provision only is void.

Pothier (Sale, n. 34) holds that the contract in such case is voidable, and this view has been adopted by some writers in this country (Story on Sales, Sec. 220; 1 Pars. Cont., 5th ed., 525), but it seems more probable that the common law would regard the contract as made for a reasonable consideration, to be ascertained in any usual way. Thus, where a covenant to renew a lease provides for an arbitration to determine the rent, and no award is ever made, the Court will enforce the renewal at a reasonable rent (*Reformed Dutch Church vs. Parkhurst*, 4 Bosw., 491; *Dunnell vs. Keteltas*, 16 Abb. Pr., 205.)

N. Y. C. C., Sec. 788.

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## TITLE II.

### MANNER OF CREATING CONTRACTS.

SECTION 1619. Contracts express or implied.

1620. Express contract, what.

1621. Implied contract, what.

1622. What contracts may be oral.

1623. Contract not in writing through fraud, may be enforced against fraudulent party.

1624. What contracts must be written.

1625. Effect of writing.

1626. Contract in writing, takes effect when.

1627. Provisions of chapter on transfers of real property.

1628. Corporate seal, how affixed.

1629. Provisions abolishing seals made applicable.

**SEC. 1619.** A contract is either express or implied.

N. Y. C. C., Sec. 789.

Contracts  
express or  
implied.

**SEC. 1620.** An express contract is one, the terms of which are stated in words.

N. Y. C. C., Sec. 790.

Express con-  
tract, what.

**SEC. 1621.** An implied contract is one, the existence and terms of which are manifested by conduct.

The ordinary definition of an implied contract includes obligations imposed by law upon parties, as between each other. These obligations are, however, considered in another part of the Code.

N. Y. C. C., Sec. 791.

Implied con-  
tract, what.

**SEC. 1622.** All contracts may be oral, except such as are specially required by statute to be in writing.

N. Y. C. C., Sec. 792.

What con-  
tracts may  
be oral.

**SEC. 1623.** Where a contract, which is required by law to be in writing, is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party.

This principle of equity ought to be recognized in all cases, whether legal or equitable.

N. Y. C. C., Sec. 793.

Contract not  
in writing  
through  
fraud, may  
be enforced  
against  
fraudulent  
party.

**SEC. 1624.** The following contracts, or some memorandum thereof, expressing the parties, their consent and the object of the contract, must be in writing, subscribed by the party to be charged thereby, or by his agent for the purpose :

What con-  
tracts must  
be written.

1. An agreement that, by its terms, cannot be fully performed within one year.
2. An agreement to answer for the debt, default or mis-carriage of another.
3. An agreement made upon consideration of marriage, other than mutual promises to marry.
4. An executory contract of marriage.

**NOTE.**—Subds. 1 and 3 are in the language of the New York Civil Code, Sec. 794. They modify Subds. 1 and 3 of Sec. 12, "Fraudulent Conveyances." The reasons are assigned in the note of the New York revisers, as follows :

"The consideration is no longer necessary to be stated (Laws of 1863, ch. 464). Such at least was the undoubted intention of the Legislature, though under the decision in *Wain vs. Warlters* (5 East, 10), it is difficult to say whether its intention is plainly expressed. The language here proposed is unmistakable in its meaning.

"The names of all the parties must be stated in the memorandum (*Williams vs. Lake*, 2 El. & El., 349).

"The whole object of the contract, and all its terms, must be expressed (*Wright vs. Weeks*, 25 N. Y., 153).

"The language of the statute is 'is not to be,' etc. It is construed as applying only to contracts which cannot possibly be executed within a year, under any contingency (*Dresser vs. Dresser*, 35 Barb., 573; *Artcher vs. Zeb*, 5 Hill, 206; *Plimpton vs. Curtiss*, 15 Wend., 336; *McLees vs. Hale*, 10 id., 426; *Moore vs. Fox*, 10 Johns., 244. Compare *Day vs. N. Y. Central R. R.*, 31 Barb., 548; *Pitkin vs. Long Island R. R.*, 2 Barb., Ch. R., 221; see *Talmadge vs. Rensselaer and Saratoga R. R.*, 13 Barb., 593).

"*Day vs. N. Y. Central R. R.*, 31 Barb., 548, 556; *Am-burger vs. Marvin*, 4 E. D. Smith, 393; *Lockwood vs. Barnes*, 3 Hill, 128; *Broadwell vs. Getman*, 2 Den., 87; *Bracegirdle vs. Heald*, 1 Barn. & Ald., 722.

"The words 'from the making thereof,' are omitted in order to harmonize the rules in relation to contracts affecting both real and personal property, which are now governed by different provisions on this point (*Young vs. Dake*, 6 N. Y., 463; overruling *Croswell vs. Crane*, 7 Barb., 191). The Commissioners think, moreover, that the strictness of this provision has worked injustice. Few yearly contracts go into effect instantly."

Subd. 2 is the second subdivision of Sec. 12, "Fraudulent Conveyances." See, also, *Guaranty*.

Subd. 3 is a new provision. This has been inserted upon recommendation of eminent lawyers, to prevent scandalous exposures of past confidential relations in actions for breach of promise, denying the action, except when there is a written contract. Of course an agreement to marry *de presenti*, followed by cohabitation, makes valid marriage an executed contract, under Sec. —.

Effect of  
writing.

SEC. 1625. The execution of a contract in writing, whether the law requires it to be written or not, super-sedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument.

N. Y. C. C., Sec. 795.

Contract in  
writing,  
takes effect  
when.

SEC. 1626. A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent.

N. Y. C. C., Sec. 796.

Provisions  
of chapter on  
transfers of  
real prop-  
erty.

SEC. 1627. The provisions of the chapter on *Transfers in General*, concerning the delivery of grants, absolute and conditional, apply to all written contracts.

N. Y. C. C., Sec. 797.

**SEC. 1628.** A corporate or official seal may be affixed to an instrument by a mere impression upon the paper or other material on which such instrument is written.

Corporate seal, how affixed.

N. Y. C. C., Sec. 798.

**SEC. 1629.** Secs. 1096 and 1097, concerning private seals and prima facie consideration, are applicable to all written contracts.

Provisions abolishing seals made applicable.

[New section.]

## TITLE III.

### INTERPRETATION OF CONTRACTS.

**SECTION 1635.** Uniformity of interpretation.

- 1636. Contracts, how to be interpreted.
- 1637. Intention of parties, how ascertained.
- 1638. Intention to be ascertained from language.
- 1639. Interpretation of written contracts.
- 1640. Writing, when disregarded.
- 1641. Effect to be given to every part of contract.
- 1642. Several contracts, when taken together.
- 1643. Interpretation in favor of contract.
- 1644. Words to be understood in usual sense.
- 1645. Technical words.
- 1646. Law of place.
- 1647. Contracts explained by circumstances.
- 1648. Contract restricted to its evident object.
- 1649. Interpretation in sense in which promiser believed promisee to rely.
- 1650. Particular clause subordinate to general intent.
- 1651. Contract, partly written and partly printed.
- 1652. Repugnancies, how reconciled.
- 1653. Inconsistent words rejected.
- 1654. Words to be taken most strongly against whom.
- 1655. Reasonable stipulations, when implied.
- 1656. Necessary incidents implied.
- 1657. Time of performance of contract.
- 1658. Time, when of essence.
- 1659. When joint and several.
- 1660. Same.
- 1661. Executed and executory contracts, what.

**SEC. 1635.** All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code.

Uniformity of interpretation.

Some distinctions are made at common law, which have no substantial foundation in reason. Thus, an instrument

under seal, signed by an agent in his own name, does not bind his principal (*Townsend vs. Hubbard*, 4 Hill, 351; *Townsend vs. Corning*, 22 Wend., 435; *Berkley vs. Hardy*, 5 B. & C., 355), though a contract not under seal, signed in this manner, would bind him (*Stanton vs. Camp*, 4 Barb., 274; see *Evans vs. Wells*, 22 Wend., 324; *Townsend vs. Hubbard*, 4 Hill, 351). In Connecticut, this technical distinction does not exist (*Magill vs. Hinesdale*, 6 Conn., 464).

N. Y. C. C., Sec. 800.

NOTE.—The words “sealed or unsealed” are struck out, but the note to the New York section is retained, as it shows additional reasons for abolishing seals.

Contracts,  
how to be  
interpreted.

SEC. 1636. A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful.

N. Y. C. C., Sec. 801.

Intention of  
parties, how  
ascertained.

SEC. 1637. For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied.

N. Y. C. C., Sec. 802.

Intention to  
be ascer-  
tained from  
language

SEC. 1638. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

N. Y. C. C., Sec. 803.

Interpreta-  
tion of writ-  
ten con-  
tracts.

SEC. 1639. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title.

N. Y. C. C., Sec. 804.

Writing,  
when disre-  
garded.

SEC. 1640. When, through fraud, mistake or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.

N. Y. C. C., Sec. 805.

Effect to be  
given to  
every part  
of contract.

SEC. 1641. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others.

N. Y. C. C., Sec. 806.

Several con-  
tracts, when  
taken to-  
gether.

SEC. 1642. Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.

N. Y. C. C., Sec. 807.



Sec. 1643. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties.

Interpretation in favor of contract.

N. Y. C. C., Sec. 808.

Sec. 1644. The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

Words to be understood in usual sense.

N. Y. C. C., Sec. 809.

Sec. 1645. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.

Technical words.

N. Y. C. C., Sec. 810.

Sec. 1646. A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

Law of place.

N. Y. C. C., Sec. 811.

Sec. 1647. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.

Contracts explained by circumstances.

N. Y. C. C., Sec. 812.

Sec. 1648. However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.

Contract restricted to its evident object.

N. Y. C. C., Sec. 813.

Sec. 1649. If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promiser believed, at the time of making it, that the promisee understood it.

Interpretation in sense in which promiser believed promisee to rely.

N. Y. C. C., Sec. 814.

Sec. 1650. Particular clauses of a contract are subordinate to its general intent.

Particular clause subordinate to general intent.

N. Y. C. C., Sec. 815.

Contract,  
partly writ-  
ten and part-  
ly printed.

SEC. 1651. Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded.

N. Y. C. C., Sec. 816.

Repugnan-  
cies, how  
reconciled.

SEC. 1652. Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract.

N. Y. C. C., Sec. 817.

Inconsistent  
words re-  
jected.

SEC. 1653. Words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected.

N. Y. C. C., Sec. 818.

Words to be  
taken most  
strongly  
against  
whom.

SEC. 1654. In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promiser is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.

N. Y. C. C., Sec. 819.

Reasonable  
stipulations,  
when im-  
plied.

SEC. 1655. Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention.

N. Y. C. C., Sec. 820.

Necessary  
incidents  
implied.

SEC. 1656. All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom; unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.

N. Y. C. C., Sec. 821.

**SEC. 1657.** If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly, as for example, if it consists in the payment of money only, it must be performed immediately upon the thing to be done being exactly ascertained.

Time of performance of contract.

N. Y. C. C., Sec. 822.

**SEC. 1658.** Time is never considered as of the essence of a contract, unless by its terms expressly so provided.

Time, when of essence.

This provision is new. As to the present law upon the subject, see Story Eq. Jur., Sec. 776. It is involved in so much difficulty, that the Commissioners deem it wise to adopt this more stringent rule.

N. Y. C. C., Sec. 823.

**SEC. 1659.** Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several.

When joint and several.

N. Y. C. C., Sec. 824.

**SEC. 1660.** A promise, made in the singular number, but executed by several persons, is presumed to be joint and several.

Same.

N. Y. C. C., Sec. 825.

**SEC. 1661.** An executed contract is one, the object of which is fully performed. All others are executory.

Executed and executory contracts, what.

N. Y. C. C., Sec. 826.

## TITLE IV.

### UNLAWFUL CONTRACTS.

**Section 1667.** What is unlawful.

1668. Certain contracts unlawful.

1669. Penalties void.

1670. Contract fixing damages, void.

1671. Exception.

1672. Restraints upon legal proceedings.

1673. Contract in restraint of trade, void.

1674. Exception in favor of sale of good will.

1675. Exception in favor of partnership arrangements.

1676. Contract in restraint of marriage, void.

What is  
unlawful.

SEC. 1667. That is not lawful which is—

1. Contrary to an express provision of law.
2. Contrary to the policy of express law, though not expressly prohibited; or,
3. Otherwise contrary to good morals.

N. Y. C. C., Sec. 827.

Certain con-  
tracts un-  
lawful.

SEC. 1668. All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or wilful injury to the person or property of another, or violation of law, whether wilful or negligent, are against the policy of the law.

N. Y. C. C., Sec. 828.

Penalties  
void.

SEC. 1669. Penalties imposed by contract for any non-performance thereof, are void. But this section does not render void such bonds or obligations, penal in form, as have heretofore been commonly used; it merely rejects and avoids the penal clauses.

N. Y. C. C., Sec. 829.

Contract  
fixing dam-  
ages, void.

SEC. 1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.

N. Y. C. C., Sec. 830.

Exception.

SEC. 1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

The use of the phrase "liquidated damages" leads frequently to an evasion of the law in respect to penalties. The Courts, not venturing to declare such contracts void, constantly discourage them. They are oppressive and unconscientious, except in the cases permitted above, and ought not to be allowed. The restrictions imposed by this section are, however, new (see *Bagley vs. Peddie*, 16 N. Y., 469; *Lampman vs. Cochran*, id., 275).

N. Y. C. C., Sec. 831.

Restraints  
upon legal  
proceedings.

SEC. 1672. Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.

The first part of this section is acknowledged law. A covenant in a contract, not to sue for a breach thereof, is void. The latter provision is new. The question involved has been variously decided in different tribunals, with a preponderance of opinion in favor of the right to limit the time of commencing actions, as a matter of law, but with frequent disapprobation of the practice. In support of the right, see *Fullam vs. New York Insurance Co.*, 7 Gray, 6; *Brown vs. Roger Williams Insurance Co.*, 5 R. I., 394; *Northwestern Insurance Co. vs. Phoenix O. & C. Co.*, 31 Penn. St., 448; *Portage Insurance Co. vs. West*, 6 Ohio St., 599; *Wilson vs. Aetna Insurance Co.*, 27 Verm., 99; also, *Ames vs. New York Insurance Co.*, 14 N. Y., 266. Against it, see *Eagle Insurance Co. vs. Lafayette Insurance Co.*, 9 Ind., 443; *French vs. Lafayette Insurance Co.*, 5 McLean, 461. The law itself, and the law alone, should regulate the limitations of actions.

N. Y. C. C., Sec. 832.

**SEC. 1673.** Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent void.

Contract in restraint of trade, void.

Contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent. In *Dunlop vs. Gregory* (10 N. Y., 241), a contract not to run a certain steamboat above Saugerties, on the Hudson, was enforced, although there was no sale of a good will, nor any circumstance to justify the contract, except that it was made upon a sale of a vessel by an association of persons who had previously used it to run above Saugerties, and wished to avoid competition. In *Whittaker vs. Howe* (3 Beav., 387), a contract not to practice law anywhere in England was specifically enforced. Such a contract manifestly tends to enforce idleness, and deprives the State of the services of its citizens.

N. Y. C. C., Sec. 833.

**SEC. 1674.** One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein.

Exception in favor of sale of good will.

The district within which a party may exclude himself from carrying on business should be accurately defined by law; and no division of the State appears to the Commissioners to be more reasonable or convenient for this purpose than a county. And no one should be allowed to prevent another from carrying on a business unless he himself provides the public with the same advantages in the same county.

N. Y. C. C., Sec. 834.

**SEC. 1675.** Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or

Exception in favor of partnership arrangements.

town where the partnership business has been transacted, or within a specified part thereof.

An agreement of this description, operating equally upon all the partners, gives to all an opportunity to start anew in business upon equal terms. In such cases, an agreement excluding them all from the county would be too broad. It may even be doubted whether "ward" should not be substituted for "city" in the text.

N. Y. C. C., Sec. 835.

Contract in restraint of marriage, void.

SEC. 1676. Every contract in restraint of the marriage of any person, other than a minor, is void.

Contracts in general restraint of marriage are certainly void (Lowe vs. Peers, 4 Burr., 2225; Hartley vs. Rice, 10 East., 22; Baker vs. White, 2 Verm., 215; Sterling vs. Sinnickson, 2 South., 756; see Conrad vs. Williams, 6 Hill, 444). Perhaps a contract simply in restraint of remarriage of the wife of one of the parties would be held valid in analogy to the rule concerning wills, but experience has shown that such stipulations tend to immorality. Restraints upon the marriage of minors are promotive of prudence, without being burdensome.

N. Y. C. C., Sec. 836.

## TITLE V.

### EXTINCTION OF CONTRACTS.

#### CHAPTER I. CONTRACTS, HOW EXTINGUISHED.

##### II. RESCISSION.

##### III. ALTERATION AND CANCELLATION.

### CHAPTER I.

#### CONTRACTS, HOW EXTINGUISHED.

##### SECTION 1682. Contract, how extinguished.

Contract, how extinguished.

SEC. 1682. A contract may be extinguished in like manner with any other obligation, and also in the manner prescribed by this Title.

N. Y. C. C., Sec. 827.

## CHAPTER II.

## RESCISSION.

**SECTION 1688.** Rescission extinguishes contract.

1689. When party may rescind.

1690. When stipulations against right to rescind do not defeat it.

1691. Rescission, how effected.

**SEC. 1688.** A contract is extinguished by its rescission.

N. Y. C. C., Sec. 838.

Rescission  
extinguishes  
contract.

**SEC. 1689.** A party to a contract may rescind the same in the following cases only:

When party  
may rescind.

1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part.

3. If such consideration becomes entirely void from any cause.

4. If such consideration, before it is rendered to him, fails in a material respect, from any cause; or,

5. By consent of all the other parties.

N. Y. C. C., Sec. 839.

**NOTE.**—See Sec. 1115, also Sec. 3307, (rescission of grant on failure of covenant of ownership) in Div. Fourth.

**SEC. 1690.** A stipulation that errors of description shall not avoid a contract, or shall be the subject of compensation, or both, does not take away the right of rescission for fraud, nor for mistake, where such mistake is in a matter essential to the inducement of the contract, and is not capable of exact and entire compensation.

When stip-  
ulations  
against  
right to re-  
scind do not  
defeat it.

N. Y. C. C., Sec. 840.

**SEC. 1691.** Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

Rescission,  
how effected.

1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from du-

ress, menace, undue influence, or disability, and is aware of his right to rescind; and,

2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.

N. Y. C. C., Sec. 841.

### CHAPTER III.

#### ALTERATION AND CANCELLATION.

##### SECTION 1697. Alteration by consent.

1698. Sealed contracts, how modified.

1699. Extinction by cancellation, etc.

1700. Extinction by unauthorized alteration.

1701. Alteration of duplicate, not to prejudice.

Alteration  
by consent.

SEC. 1697. A contract may be altered in any respect by consent of the parties, without a new consideration, and is extinguished thereby to the extent of the alteration.

Alterations generally, but not always, consist in the substitution of a new contract for the one that is superseded. Such an alteration is a novation, and is considered under that head.

A consideration is necessary to make an alteration valid at common law. A novation implies a consideration, but an alteration of any other kind amounts only to a partial release without seal. See the chapter on *Release*. Even a mere extension of the time for performance requires a consideration to support it (*Kellogg vs. Olmstead*, 25 N. Y., 189; aff'g S. C., 23 Barb., 96).

N. Y. C. C., Sec. 842.

NOTE.—But see Secs. 1532 and 1533 of this Code, on “Novation.”

Sealed con-  
tracts, how  
modified.

SEC. 1698. A contract in writing may be altered by contract in writing, or by an executed oral agreement; and not otherwise, except as to the time of performance, which may be extended by any form of agreement.

N. Y. C. C., Sec. 843.

Extinction  
by cancella-  
tion, etc.

SEC. 1699. The destruction or cancellation of a written contract, or of the signature of the parties liable thereon, with intent to extinguish the obligation thereof,



extinguishes it as to all the parties consenting to the act.  
The intent in such case is prima facie presumed.

N. Y. C. C., Sec. 844.

NOTE.—See Sec. 1533 of this Code.

SEC. 1700. The intentional destruction, cancellation or material alteration of a written contract, by a party entitled to any benefit under it, or with his consent, extinguishes all the executory obligations of the contract in his favor, against parties who do not consent to the act.

Extinction  
by unau-  
thorized  
alteration.

N. Y. C. C., Sec. 845.

SEC. 1701. Where a contract is executed in duplicate, an alteration or destruction of one copy, while the other exists, is not within the provisions of the last section.

Alteration  
of duplicate,  
not to preju-  
dice.

N. Y. C. C., Sec. 846.



## PART III.

### OBLIGATIONS IMPOSED BY LAW.

SECTION 1708. Abstinence from injury.

1709. Fraudulent deceit.

1710. Deceit, what.

1711. Deceit upon the public, etc.

1712. Restoration of thing wrongfully acquired. .

1713. When demand necessary.

1714. Responsibility for wilful acts, negligence, etc.

1715. Other obligations.

SEC. 1708. Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights.

Abstinence  
from injury.

N. Y. C. C., Sec. 847.

SEC. 1709. One who wilfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

Fraudulent  
deceit.

N. Y. C. C., Sec. 848.

SEC. 1710. A deceit, within the meaning of the last section, is either—

Deceit, what.

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true.

3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,

4. A promise, made without any intention of performing it.

N. Y. C. C., Sec. 849.

SEC. 1711. One who practices a deceit with intent to defraud the public, or a particular class of persons, is

Deceit upon  
the public,  
etc.

deemed to have intended to defraud every individual in that class, who is actually misled by the deceit.

N. Y. C. C., Sec. 850.

Restoration  
of thing  
wrongfully  
acquired.

SEC. 1712. One who obtains a thing without the consent of its owner, or by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse, must restore it to the person from whom it was thus obtained, unless he has acquired a title thereto superior to that of such other person, or unless the transaction was corrupt and unlawful on both sides.

N. Y. C. C., Sec. 851.

When de-  
mand neces-  
sary.

SEC. 1713. The restoration required by the last section must be made without demand; except where a thing is obtained by mutual mistake, in which case the party obtaining the thing is not bound to return it until he has notice of the mistake.

N. Y. C. C., Sec. 852.

Responsibil-  
ity for wilful  
acts, negli-  
gence, etc.

SEC. 1714. Every one is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person; except so far as the latter has, wilfully, or by want of ordinary care, brought the injury upon himself.

N. Y. C. C., Sec. 853.

Other obli-  
gations.

SEC. 1715. Other obligations are prescribed by Divs. First and Second of this Code.

N. Y. C. C., Sec. 854.

## PART IV.

### OBLIGATIONS ARISING FROM PARTICULAR TRANSACTIONS.

- TITLE I. SALE.
- II. EXCHANGE.
- III. DEPOSIT.
- IV. LOAN.
- V. HIRING.
- VI. SERVICE.
- VII. CARRIAGE.
- VIII. TRUST.
- IX. AGENCY.
- X. PARTNERSHIP.
- XI. INSURANCE.
- XII. INDEMNITY.
- XIII. GUARANTY.
- XIV. LIEN.
- XV. NEGOTIABLE INSTRUMENTS.
- XVI. GENERAL PROVISIONS.

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## TITLE I.

### SALE.

- CHAPTER I. GENERAL PROVISIONS.
- II. RIGHTS AND OBLIGATIONS OF THE SELLER.
- III. RIGHTS AND OBLIGATIONS OF THE BUYER.
- IV. SALE BY AUCTION.

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## CHAPTER I.

### GENERAL PROVISIONS.

- ARTICLE I. SALE.
- II. AGREEMENTS FOR SALE.
- III. FORM OF THE CONTRACT.

## ARTICLE I.

## SALE.

## SECTION 1721. Sale, what.

## 1722. Subject of sale.

Sale, what.

SEC. 1721. Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property.

N. Y. C. C., Sec. 855.

Subject of sale.

SEC. 1722. The subject of sale must be property, the title to which can be immediately transferred from the seller to the buyer.

N. Y. C. C., Sec. 856.

## ARTICLE II.

## AGREEMENTS FOR SALE.

## SECTION 1726. Agreement for sale.

## 1727. Agreement to sell.

## 1728. Agreement to buy.

## 1729. Agreement to sell and buy.

## 1730. What may be the subject of the contract.

## 1731. Agreement to sell real property.

## 1732. Authority of agent to execute executory contract must be in writing.

## 1733. Form of grant required by such contract. Code Covenants.

## 1734. Usual Common Law Covenants required by such contracts, when.

## 1735. Form of such covenants.

Agreement for sale.

SEC. 1726. An agreement for sale is either—

1. An agreement to sell.

2. An agreement to buy; or,

3. A mutual agreement to sell and buy.

N. Y. C. C., Sec. 857.

Agreement to sell.

SEC. 1727. An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing.

N. Y. C. C., Sec. 858.

Agreement to buy.

SEC. 1728. An agreement to buy is a contract by which one engages to accept from another, and pay a price for the title to a certain thing.

N. Y. C. C., Sec. 859.

**Sec. 1729** An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor.

Agreement to sell and buy.

N. Y. C. C., Sec. 860.

**Sec. 1730.** Any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not.

What may be the subject of the contract.

N. Y. C. C., Sec. 861.

**Sec. 1731.** An agreement to sell real property is an executory contract, which binds the seller to execute a grant in the form and manner prescribed by the chapter on *Transfers of Real Property* and by this article.

Agreement to sell real property.

N. Y. C. C., Sec. 862.

**Sec. 1732.** The authority of an agent to execute an executory real instrument must be in writing, subscribed by the principal, or by an agent of the principal, duly authorized by writing.

Authority of agent to execute executory contract must be in writing.

[New section.]

**Sec. 1733** An executory contract to grant real property obligates the seller to convey by grant—

Form of grant required by such contract.

1. If no covenants are required by the terms of the executory contract, then by grant in form prescribed by Sec. 1102.

2. If Special Code Covenants are required by the terms of the contract, then by grant in form prescribed by Sec. 1107.

Code Covenants.

3. If General Code Covenants are required by the terms of the contract, then by grant in form prescribed by Sec. 1108.

[New section.] **NOTE.**—The following sections, taken from the New York Civil Code, show how this matter of covenants is disposed of there. They are *entirely consistent* with the Code Covenants. Both can be retained in the Code and the conveyancer can take his choice; or either can be omitted.

**Sec. 1734.** An agreement on the part of a seller of real property to give the usual Common Law Covenants, binds him to insert in the grant covenants of "seizin," "quiet enjoyment," "further assurance," "general warranty," and "against encumbrances."

Usual Common Law Covenants required by such contracts, when

N. Y. C. C., Sec. 863.

NOTE.—The words “common law” are interpolated, in contradistinction to “code” covenants.

It is observed that the covenant of “right to convey” is omitted by the New York revisers. Why?

Form of such covenants.

SEC. 1735. The covenants mentioned in the last section must be as follows: “The party of the first part covenants with the party of the second part, that the former is now seized in fee simple of the property granted; that the latter shall enjoy the same without any lawful disturbance; that the same is free from all encumbrances; that the party of the first part, and all persons acquiring any interest in the same through or for him, will, on demand, execute and deliver to the party of the second part, at the expense of the latter, any further assurance of the same that may be reasonably required; and that the party of the first part will warrant to the party of the second part all the said property against every person lawfully claiming the same.”

This provision is new. Its object is the same as that of Sec. 485, namely, to reduce the length of conveyances, and to provide a plain and sufficient form, as is done by the English statute (8 and 9 Vic., Chap. 119). The Commissioners believe that the form here given is sufficient to cover all the intricately worded stipulations usually given in such cases.

N. Y. C. C., Sec. 854.

### ARTICLE III.

#### FORM OF THE CONTRACT.

SECTION 1739. Contract for sale of personal property.

1740. Contract to manufacture.

1741. Contract for sale of real property.

Contract for sale of personal property.

SEC. 1739. No sale of personal property, or agreement to buy or sell it, for a price of two hundred dollars or more, is valid, unless—

1. A memorandum of the contract, showing the parties, their consent, and the subject of sale, is made in writing, and subscribed by the party to be charged; or,

2. The buyer accepts and receives part of the thing sold, or, when it consists of a thing in action, part of the evidences thereof; or,

3. The buyer, at the time of sale, pays a part of the price.

“Fraudulent Conveyances and Contracts,” Sec. 13; N.

Y. C. C., Sec. 865.



**SEC. 1740.** An agreement to manufacture a thing, from materials furnished by the manufacturer or by another person, is not within the provisions of the last section. Contract to manufacture

N. Y. C. C., Sec. 866.

**SEC. 1741.** No agreement for the sale of real property, or of any estate therein, is valid, unless a memorandum thereof, showing the parties, their consent, and the subject of sale, is made in writing, and subscribed by the party to be charged, or unless the contract has been partially performed by the party seeking to enforce it, and such part performance has been accepted by the other. Contract for sale of real property.

These particulars are specifically mentioned, in order to avoid the possibility of an interpretation requiring the consideration to be stated.

2 R. S., 135, Sec. 8; except that "the party to be charged" is substituted for "the vendor," so as to establish a rule uniform with that concerning sales of personal property.

2 R. S., 135, Sec. 9, retains the equitable doctrines of part performance. This provision is doubtless rather broader than the rules of equity would sustain, as it has always been required that, to take the case out of the statute, the party seeking to enforce an oral contract must show that he cannot be replaced in his former position (*Malins vs. Brown*, 4 N. Y., 403; *Bennett vs. Abrams*, 41 Barb., 619; *Williston vs. Williston*, id., 635; *Lowry vs. Tew*, 3 Barb. Ch., 407; *Rhodes vs. Rhodes*, 3 Sandf. Ch., 279; *Wolfe vs. Frost*, 4 id., 72; *German vs. Machin*, 6 Paige, 238; *Frame vs. Dawson*, 14 Ves., 386.)

But it is to be remembered that the equitable doctrine of part performance was always in contradiction of the letter of the statute, and that the Courts might therefore well hesitate to go so far as their sense of abstract justice would have dictated. In reducing their doctrines to the form of a statute, it seems only proper to adopt the principle which lies at the foundation of those decisions, without the restrictions which were imposed from a regard for the adverse provision of the statute of frauds.

This provision is inserted in this place, instead of being left to the chapter on *Specific Performance*, because it is thought that the fusion of law and equity makes this the proper course.

N. Y. C. C., Sec. 867.

NOTE.—See Secs. 1091, 1092 and 1732, of this Code.

## CHAPTER II.

### RIGHTS AND OBLIGATIONS OF THE SELLER.

#### ARTICLE I. RIGHTS AND DUTIES BEFORE DELIVERY.

##### II. DELIVERY.

##### III. WARRANTY.

## ARTICLE I.

## RIGHTS AND DUTIES BEFORE DELIVERY.

SECTION 1748. When seller must act as depositary.

1749. When seller may resell.

When seller  
must act as  
depositary.

SEC. 1748. After personal property has been sold, and until the delivery is completed, the seller has the rights and obligations of a depositary for hire, except that he must keep the property, without charge, until the buyer has had a reasonable opportunity to remove it.

N. Y. C. C., Sec. 869.

When seller  
may resell.

SEC. 1749. If a buyer of personal property does not pay for it according to contract, and it remains in the possession of the seller, after payment is due, the seller may rescind the sale, or may enforce his lien for the price in the manner prescribed by the Title on *Liens*.

N. Y. C. C., Sec. 870.

## ARTICLE II.

## DELIVERY.

SECTION 1753. Delivery on demand.

1754. Delivery, where made.

1755. Expense of transportation.

1756. Notice of election as to delivery.

1757. Buyer's directions as to manner of sending thing sold.

1758. Delivery to be within reasonable hours.

1759. Sale of personal property, when void.

Delivery on  
demand.

SEC. 1753. One who sells personal property, whether it was in his possession at the time of sale or not, must put it into a condition fit for delivery, and deliver it to the buyer within a reasonable time after demand, unless he has a lien thereon.

N. Y. C. C., Sec. 871.

Delivery,  
where made.

SEC. 1754. Personal property sold is deliverable at the place where it is at the time of the sale or agreement to sell, or, if it is not then in existence, it is deliverable at the place where it is produced.

N. Y. C. C., Sec. 872.

Expense of  
transporta-  
tion.

SEC. 1755. One who sells personal property must bring it to his own door, or other convenient place, for its

acceptance by the buyer, but further transportation is at the risk and expense of the buyer.

N. Y. C. C., Sec. 873.

SEC. 1756. When either party to a contract of sale has an option as to the time, place or manner of delivery, he must give the other party reasonable notice of his choice; and if he does not give such notice within a reasonable time, his right of option is waived.

Notice of election as to delivery.

N. Y. C. C., Sec. 874.

SEC. 1757. If a seller agrees to send the thing sold to the buyer, he must follow the directions of the latter as to the manner of sending, or it will be at his own risk during its transportation. If he follows such directions, or if, in the absence of special directions, he uses ordinary care in forwarding the thing, it is at the risk of the buyer.

Buyer's directions as to manner of sending thing sold.

N. Y. C. C., Sec. 875.

SEC. 1758. The delivery of a thing sold can be offered or demanded only within reasonable hours of the day.

Delivery to be within reasonable hours.

N. Y. C. C., Sec. 876.

SEC. 1759. A sale of personal property in the possession or under the control of the seller must be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, or such sale is void as against the creditors of the seller, or subsequent purchaser in good faith and for valuable consideration.

Sale of personal property, when void.

[New section.] NOTE.—Based on "Fraudulent Conveyances," Sec. 15, "and for valuable consideration," added to harmonize in effect of non-recording of real property.

### ARTICLE III.

#### WARRANTY.

SECTION 1763. Warranty, what.

1764. No implied warranty in mere contract of sale.

1765. Warranty of title to personal property.

1766. Warranty on sale by sample.

1767. When seller knows that buyer relies on his statements, etc.

1768. Merchandise not in existence.

1769. Manufacturer's warranty against latent defects.

1770. Thing bought for particular purpose.

1771. When thing cannot be examined by buyer.

1772. Trade marks.

## SECTION 1773. Other marks.

1774. Warranty on sale of written instrument.

1775. Warranty of provisions for domestic use.

1776. Warranty on sale of good will.

1777. Warranty upon judicial sale.

1778. Effect of general warranty.

Warranty,  
what.

SEC. 1763. A warranty is an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction, whether past, present or future.

N. Y. C. C., Sec. 877.

No implied  
warranty in  
mere con-  
tract of sale.

SEC. 1764. Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty.

N. Y. C. C., Sec. 878.

Warranty  
of title to  
personal  
property.

SEC. 1765. One who sells or agrees to sell personal property, as his own, [whether in or out of possession thereof] thereby warrants that he has a good and unencumbered title thereto.

Defreeze vs. Trumper, 1 Johns., 274; Reid vs. Barber, 3 Cow., 272; and see Hoe vs. Sanborn, 21 N. Y., 555. Whether this warranty is now implied, where the property is not in possession of the vendor, is in dispute. It is held that it is not, in M'Coy vs. Archer, 3 Barb., 323; Huntington vs. Hall, 36 Me., 501; that it is, in Smith vs. Fairbanks, 7 Foster, 521; see Strong vs. Barnes, 11 Vt., 221. It certainly is implied, when the property is in his possession (Burt vs. Dewey, 31 Barb., 540.)

N. Y. C. C., Sec. 879.

NOTE.—The words in brackets are new—inserted to harmonize with “Transfers of Real Property.” See Sec. 1047. Either this, or make clear the other proposition by substituting for the words in brackets, the following, “when in possession thereof.”

Warranty  
on sale by  
sample.

SEC. 1766. One who sells or agrees to sell, goods by sample, thereby warrants the bulk to be equal to the sample.

N. Y. C. C., Sec. 880.

When seller  
knows that  
buyer relies  
on his state-  
ment, etc.

SEC. 1767. One who sells or agrees to sell personal property, knowing that the buyer relies upon his advice or judgment, thereby warrants to the buyer that neither the seller, nor any agent employed by him in the transaction, knows the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy.

It is utterly impossible to reconcile the cases on this subject. This rule is perhaps as near their result as any that could be stated in as few words (see *Hoe vs. Sanborn*, 21 N. Y., 552; *Brown vs. Montgomery*, 20 id., 487; 2 Kent Com., 480).

It will be observed that it is only facts concerning the thing that are required to be disclosed. This restricts the range of the section to matters which, in morals, ought perhaps to be disclosed in even a broader class of cases.

N. Y. C. C., Sec. 831.

SEC. 1768. One who agrees to sell merchandise not then in existence, thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties, and as nearly so, at the place of delivery, as can be secured by reasonable care.

Merchandise not in existence.

This principle, though not directly adjudicated, is clearly at the foundation of the decisions in regard to sales of goods to be manufactured by the seller (see Sec. 883), and is a necessary corollary of the rule which implies a warranty of goods which the buyer has had no opportunity to inspect (see Sec. 885). *Hamilton vs. Ganyard*, 34 Barb., 204, supports the rule here stated.

The absolute warranty extends only to the place of production. The inevitable injuries of transportation must be borne by the buyer (*Bull vs. Robison*, 10 Exch., 342). But of course this is to be construed in view of the intention of the parties. If an article is purchasable in New York, in perfect condition, and the same kind of thing is imported from London, but is always injured by the voyage, the seller cannot compel the buyer to accept the latter article, unless the parties contemplated London as the place of production.

N. Y. C. C., Sec. 882.

SEC. 1769. One who sells or agrees to sell an article of his own manufacture, thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein.

Manufacturer's warranty against latent defects.

N. Y. C. C., Sec. 883.

SEC. 1770. One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose.

Thing bought for particular purpose.

N. Y. C. C., Sec. 884.

SEC. 1771. One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable.

When thing cannot be examined by buyer.

N. Y. C. C., Sec. 885.

**Trade marks** SEC. 1772. One who sells or agrees to sell any article to which there is affixed or attached a trade mark, thereby warrants that mark to be genuine, and lawfully used.

From Stat. 25 and 26 Vict., Chap. 88, Sec. 19. This statute enacts that this warranty can be dispensed with only by a written refusal to warrant.

N. Y. C. C., Sec. 886.

**Other marks** SEC. 1773. One who sells or agrees to sell any article to which there is affixed or attached a statement or mark to express the quantity or quality thereof, or the place where it was, in whole or in part, produced, manufactured or prepared, thereby warrants the truth thereof.

N. Y. C. C., Sec. 887.

**Warranty on sale of written instrument.** SEC. 1774. One who sells or agrees to sell an instrument purporting to bind any one to the performance of an act, thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all the parties thereto; and also warrants that he has no knowledge of any facts which tend to prove it worthless, such as the insolvency of any of the parties thereto, where that is material, the extinction of its obligations, or its invalidity for any cause.

Gurney vs. Womersley, 4 El. & Bl., 133; Cabot Bank vs. Morton, 4 Gray, 156; Herrick vs. Whitney, 15 Johns., 249; Gompertz vs. Bartlett, 2 El. & Bl., 849; Canal Bank vs. Bank of Albany, 1 Hill, 287.

Delaware Bank vs. Jarvis, 20 N. Y., 226; Furniss vs. Ferguson, 15 id., 437; Young vs. Cole, 2 Bing. N. C., 724; 4 Scott, 489.

In some cases the value of an obligation may be entirely independent of the solvency of the party bound thereby, as for example, where he is bound to execute a power.

Brown vs. Montgomery, 20 N. Y., 287. He does not warrant the solvency of the parties (Elwell vs. Chamberlain, 4 Bosw., 320).

N. Y. C. C., Sec. 888.

**Warranty of provisions for domestic use.** SEC. 1775. One who makes a business of selling provisions for domestic use warrants, by a sale thereof, to one who buys for actual consumption, and not for the purpose of sale, that they are sound and wholesome.

Burnby vs. Bollett, 16 M. & W., 644.

Moses vs. Mead, 1 Denio, 379; 5 id., 617; Goldrich vs. Ryan, 3 E. D. Smith, 324; Hyland vs. Sherman, 2 id., 234.

Van Bracklin vs. Fonda, 12 Johns., 468. In a recent English decision (Emmerton vs. Mathews, 7 H. & N., 536), it was held that no such warranty is implied; that the seller's liability rests solely upon the ground of fraud; and, therefore, that he is not liable unless he knows that the provisions are bad.

N. Y. C. C., Sec. 889.

**SEC. 1776.** One who sells the good will of a business, Warranty on sale of good will. thereby warrants that he will not endeavor to draw off any of the customers.

N. Y. C. C., Sec. 890.

**SEC. 1777.** Upon a judicial sale, the only warranty Warranty upon judicial sale. implied is that the seller does not know that the sale will not pass a good title to the property.

N. Y. C. C., Sec. 891.

**SEC. 1778.** A general warranty does not extend to Effect of general warranty. defects inconsistent therewith, of which the buyer was then aware, or which were then easily discernable by him, without the exercise of peculiar skill; but it extends to all other defects.

N. Y. C. C., Sec. 892.

### CHAPTER III.

#### RIGHTS AND OBLIGATIONS OF THE BUYER.

**SECTION 1784.** Price, when to be paid.

1785. Right to inspect goods.

1786. Rights in case of breach of warranty.

**SEC. 1784.** A buyer must pay the price of the thing Price, when to be paid. sold, on its delivery; and must take it away within a reasonable time after the seller offers to deliver it.

N. Y. C. C., Sec. 893.

**SEC. 1785.** On an agreement for sale, with warranty, Right to inspect goods. the buyer has a right to inspect the thing sold, at a reasonable time before accepting it; and may rescind the contract if the seller refuses to permit him to do so.

N. Y. C. C., Sec. 894.

**SEC. 1786.** The breach of a warranty entitles the Rights in case of breach of warranty. buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition.

N. Y. C. C., Sec. 895.

**NOTE.**—See Sec. 3307 of this Code, on "Rescission of Covenant of Ownership."

## CHAPTER IV.

## SALE BY AUCTION.

SECTION 1792. Sale by auction, what.

1793. Sale, when complete.

1794. Withdrawal of bid.

1795. Sale under written conditions.

1796. Rights of buyer upon sale without reserve.

1797. By-bidding.

1798. Auctioneer's memorandum of sale.

Sale by auc-  
tion, what.

SEC. 1792. A sale by auction is a sale by public outcry to the highest bidder on the spot.

N. Y. C. C., Sec. 896.

Sale, when  
complete.

SEC. 1793. A sale by auction is complete when the auctioneer publicly announces, by the fall of his hammer, or in any other customary manner, that the thing is sold.

N. Y. C. C., Sec. 897.

Withdrawal  
of bid.

SEC. 1794. Until the announcement mentioned in the last section has been made, any bidder may withdraw his bid, if he does so in a manner reasonably sufficient to bring it to the notice of the auctioneer.

N. Y. C. C., Sec. 898.

Sale under  
written con-  
ditions.

SEC. 1795. When a sale by auction is made upon written or printed conditions, such conditions cannot be modified by any oral declaration of the auctioneer, except so far as they are for his own benefit.

N. Y. C. C., Sec. 899.

Rights of  
buyer upon  
sale without  
reserve.

SEC. 1796. If, at a sale by auction, the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale to him; and, upon such a sale, bids by the seller, or any agent for him, are void.

N. Y. C. C., Sec. 900.

By-bidding.

SEC. 1797. The employment by a seller, of any person to bid at a sale by auction, without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of the seller to enforce his



bid, is a fraud upon the buyer, which entitles him to rescind his purchase.

N. Y. C. C., Sec. 901.

**SEC. 1798.** When property is sold by auction, the auctioneer, or his partner or clerk, may enter in a sale book, at the time of the sale, a memorandum specifying the name of the person for whom he sells, the thing sold, the price, the terms of sale, and the name of the buyer. A memorandum thus made binds both the parties in the same manner as if made by themselves [and is a memorandum of the contract, within the meaning of Sec. 1739].

Auctioneer's  
memoran-  
dum of sale.

N. Y. C. C., Sec. 902—modified in form, but not in effect;  
“Fraudulent Conveyances and Contracts,” Sec. 14.

**NOTE.**—The section from the New York Civil Code, with the new in brackets, contains the substance of Sec. 14, cited.

## TITLE II.

### EXCHANGE.

**SECTION 1804.** Exchange, what.

1805. Form of contract.

1806. Parties have rights and obligations of sellers and buyers.

1807. Warranty of money.

**SEC. 1804.** Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only.

Exchange,  
what.

N. Y. C. C., Sec. 903.

**SEC. 1805.** The provisions of Sec. 1739 apply to all exchanges in which the value of the thing to be given by either party is two hundred dollars or more.

Form of  
contract.

N. Y. C. C., Sec. 904.

**NOTE.**—“Two hundred” substituted for “fifty,” corresponding with Sec. 1793.

**SEC. 1806.** The provisions of the Title on *Sale* apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and of a buyer as to that which he takes.

Parties have  
rights and  
obligations  
of sellers  
and buyers.

N. Y. C. C., Sec. 905.

Warranty  
of money.

SEC. 1807. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

N. Y. C. C., Sec. 906.

## TITLE III.

### DEPOSIT.

#### CHAPTER I. DEPOSIT IN GENERAL.

##### II. DEPOSIT FOR KEEPING.

##### III. DEPOSIT FOR EXCHANGE.

### CHAPTER I.

#### DEPOSIT IN GENERAL.

##### ARTICLE I. NATURE AND CREATION OF DEPOSIT.

##### II. OBLIGATIONS OF THE DEPOSITARY.

#### ARTICLE I.

##### NATURE AND CREATION OF DEPOSIT.

##### SECTION 1813. Deposit, kinds of.

1814. Voluntary deposit, how made.

1815. Involuntary deposit, how made.

1816. Same.

1817. Deposit for keeping, what.

1818. Deposit for exchange, what.

Deposit,  
kinds of.

SEC. 1813. A deposit may be voluntary or involuntary; and for safe keeping or for exchange.

N. Y. C. C., Sec. 907.

Voluntary  
deposit, how  
made.

SEC. 1814. A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former, or of a third party. The person giving is called the depositor, and the person receiving, the depositary.

N. Y. C. C., Sec. 908.

Involuntary  
deposit, how  
made.

SEC. 1815. An involuntary deposit is made—

1. By the accidental leaving or placing of personal

property in the possession of any person, without negligence on the part of its owner; or,

2. In cases of fire, shipwreck, inundation, insurrection, riot or like extraordinary emergencies, by the owner of personal property committing it, out of necessity, to the care of any person.

N. Y. C. C., Sec. 909.

SEC. 1816. The person with whom a thing is deposited in the manner described in the last section is bound to take charge of it, if able to do so. Same.

N. Y. C. C., Sec. 910.

SEC. 1817. A deposit for keeping is one in which the depositary is bound to return the identical thing deposited. Deposit for keeping, what.

N. Y. C. C., Sec. 911.

SEC. 1818. A deposit for exchange is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited. Deposit for exchange, what.

N. Y. C. C., Sec. 912.

## ARTICLE II.

### OBLIGATIONS OF THE DEPOSITARY.

SECTION 1822. Depositary must deliver on demand.

1823. No obligation to deliver without demand.

1824. Place of delivery.

1825. Notice to owner of adverse claim.

1826. Notice to owner of thing wrongfully detained.

1827. Delivery of thing owned jointly, etc.

SEC. 1822. A depositary must deliver the thing to the person for whose benefit it was deposited, on demand, whether the deposit was made for a specified time or not, unless he has a lien upon the thing deposited, or has been forbidden or prevented from doing so by the real owner thereof, or by the act of the law, and has given the notice required by Sec. 1825. Depositary must deliver on demand.

N. Y. C. C., Sec. 913.

SEC. 1823. A depositary is not bound to deliver a thing deposited without demand, even where the deposit is made for a specified time. No obligation to deliver without demand.

N. Y. C. C., Sec. 914.

Place of  
delivery.

SEC. 1824. A depositary must deliver the thing deposited at his residence or place of business, as may be most convenient for him.

N. Y. C. C., Sec. 915.

Notice to  
owner of ad-  
verse claim.

SEC. 1825. A depositary must give prompt notice to the person for whose benefit the deposit was made, of any proceedings taken adversely to his interest in the thing deposited, which may tend to excuse the depositary from delivering the thing to him.

N. Y. C. C., Sec. 916.

Notice to  
owner of  
thing wrong-  
fully de-  
tained.

SEC. 1826. A depositary, who believes that a thing deposited with him is wrongfully detained from its true owner, may give him notice of the deposit; and if within a reasonable time afterwards he does not claim it, and sufficiently establish his right thereto, and indemnify the depositary against the claim of the depositor, the depositary is exonerated from liability to the person to whom he gave the notice, upon returning the thing to the depositor, or assuming, in good faith, a new obligation changing his position in respect to the thing, to his prejudice.

N. Y. C. C., Sec. 917.

Delivery of  
thing owned  
jointly, etc.

SEC. 1827. If a thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its delivery, the depositary may deliver to each his proper share thereof, if it can be done without injury to the thing.

This provision is new, but is intended to obviate a difficulty which may sometimes arise.

N. Y. C. C., Sec. 918.

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## CHAPTER II.

### DEPOSIT FOR KEEPING.

#### ARTICLE I. GENERAL PROVISIONS.

##### II. GRATUITOUS DEPOSIT.

##### III. STORAGE.

##### IV. INNKEEPERS.

##### V. FINDING.

## ARTICLE I.

## GENERAL PROVISIONS.

**SECTION 1833.** Depositor must indemnify depositary.

1834. Obligation of depositary of animals.

1835. Obligations as to use of thing deposited.

1836. Liability for damage arising from wrongful use.

1837. Sale of thing in danger of perishing.

1838. Injury to, or loss of thing deposited.

1839. Service rendered by depositary.

1840. Extent of his liability for negligence.

**SEC. 1833.** A depositor must indemnify the depositary—

Depositor  
must indem-  
nify depos-  
itary.

1. For all damage caused to him by the defects or vices  
of the thing deposited; and,

2. For all expenses necessarily incurred by him about  
the thing, other than such as are involved in the nature  
of the undertaking.

N. Y. C. C., Sec. 919.

**SEC. 1834.** A depositary of living animals must pro-  
vide them with suitable food and shelter, and treat them  
kindly.

Obligation  
of depositary  
of animals.

N. Y. C. C., Sec. 920.

**SEC. 1835.** A depositary may not use the thing depos-  
ited, or permit it to be used, for any purpose, without the  
consent of the depositor. He may not, if it is purposely  
fastened by the depositor, open it without the consent of  
the latter, except in case of necessity.

Obligations  
as to use of  
thing depos-  
ited.

N. Y. C. C., Sec. 921.

**SEC. 1836.** A depositary is liable for any damage hap-  
pening to the thing deposited, during his wrongful use  
thereof, unless such damage must inevitably have hap-  
pened though the property had not been thus used.

Liability for  
damage aris-  
ing from  
wrongful use

N. Y. C. C., Sec. 922.

**SEC. 1837.** If a thing deposited is in actual danger of  
perishing before instructions can be obtained from the  
depositor, the depositary may sell it for the best price  
obtainable, and retain the proceeds as a deposit, giving  
immediate notice of his proceedings to the depositor.

Sale of thing  
in danger of  
perishing.

N. Y. C. C., Sec. 923.

Injury to, or  
loss of thing  
deposited.

SEC. 1838. If a thing is lost or injured during its deposit, and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred, so far as he has information concerning them, or wilfully misrepresents the circumstances to him, the depositary is presumed to have wilfully, or by gross negligence, permitted the loss or injury to occur.

N. Y. C. C., Sec. 924.

Service rendered by  
depositary.

SEC. 1839. So far as any service is rendered by a depositary, or required from him, his duties and liabilities are prescribed by the Title on *Employment and Service*.

N. Y. C. C., Sec. 925.

Extent of his  
liability for  
negligence.

SEC. 1840. The liability of a depositary for negligence is limited to the amount which he is informed, or has reason to suppose, the thing deposited to be worth.

N. Y. C. C., Sec. 926.

## ARTICLE II.

### GRATUITOUS DEPOSIT.

SECTION 1844. Gratuitous deposit, what.

1845. Nature of involuntary deposit.

1846. Degree of care required of gratuitous depositary.

1847. His duties cease, when.

Gratuitous  
deposit, what

SEC. 1844. Gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited.

N. Y. C. C., Sec. 927.

Nature of  
involuntary  
deposit.

SEC. 1845. An involuntary deposit is gratuitous, the depositary being entitled to no reward.

N. Y. C. C., Sec. 928.

Degree of  
care required  
of gratuitous  
depositary.

SEC. 1846. A gratuitous depositary must use at least slight care for the preservation of the thing deposited.

N. Y. C. C., Sec. 929.

His duties  
cease, when.

SEC. 1847. The duties of a gratuitous depositary cease—

1. Upon his restoring the thing deposited to its owner;

or,

2. Upon his giving reasonable notice to the owner to remove it, and the owner failing to do so within a reason-

able time. But an involuntary depositary, under Subd. 2 of Sec. 1815, cannot give such notice until the emergency which gave rise to the deposit is past.

N. Y. C. C., Sec. 930.

### ARTICLE III.

#### STORAGE.

SECTION 1851. Deposit for hire.

1852. Degree of care required of depositary for hire.

1853. Rate of compensation for fraction of a week, etc.

1854. Termination of deposit.

1855. Same.

SEC. 1851. A deposit not gratuitous is called storage. The depositary in such case is called a depositary for hire.

N. Y. C. C., Sec. 931.

SEC. 1852. A depositary for hire must use at least ordinary care for the preservation of the thing deposited.

N. Y. C. C., Sec. 932.

SEC. 1853. In the absence of a different agreement or usage, a depositary for hire is entitled to one week's hire for the sustenance and shelter of living animals during any fraction of a week, and to half a month's hire for the storage of any other property during any fraction of a half month.

N. Y. C. C., Sec. 933.

SEC. 1854. In the absence of an agreement as to the length of time during which a deposit is to continue, it may be terminated by the depositor at any time, and by the depositary upon reasonable notice.

N. Y. C. C., Sec. 934.

SEC. 1855. Notwithstanding an agreement respecting the length of time during which a deposit is to continue, it may be terminated by the depositor on paying all that would become due to the depositary in case of the deposit so continuing.

N. Y. C. C., Sec. 935.

## ARTICLE IV.

## INNKEEPERS.

## SECTION 1859. Innkeeper's liability.

1860. How exempted from liability.

Innkeeper's  
liability.

SEC. 1859. An innkeeper is liable for all losses of, or injuries to personal property placed by his guests under his care, unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn.

N. Y. C. C., Sec. 936.

How ex-  
empted from  
liability.

SEC. 1860. If an innkeeper keeps a fireproof safe, and gives notice to a guest, either personally, or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe, and will not be liable for money, jewelry, documents, or other articles of unusual value and small compass, unless placed therein, he is not liable, except so far as his own acts contribute thereto, for any loss of, or injury to, such articles, if not deposited with him, and not required by the guest for present use.

N. Y. C. C., Sec. 937 ; Cal. C. C., Sec. 3024, "Innkeeper's Lien."

## ARTICLE V.

## FINDING.

## SECTION 1864. Obligation of finder.

1865. Finder to notify owner.

1866. Claimant to prove ownership.

1867. Reward, etc., to finder.

1868. Finder may put thing found on storage.

1869. When finder may sell the thing found.

1870. How sale is to be made.

1871. Surrender of thing to the finder.

1872. Thing abandoned.

Obligation  
of finder.

SEC. 1864. One who finds a thing lost is not bound to take charge of it, but if he does so, he is thenceforward a depositary for the owner, with the rights and obligations of a depositary for hire.

This section, and some of the ensuing ones, differ materially from the common law, under which the finder is a gratuitous depositary. Mr. Justice Story considered the law in this respect to be unsatisfactory, and the Commis-



sioners have altered it, giving the finder a reward, and holding him to a corresponding accountability. This is more just to both parties.

N. Y. C. C., Sec. 938.

SEC. 1865. If the finder of a thing knows or suspects who is the owner, he must, with reasonable diligence, give him notice of the finding; and if he fails to do so, he is liable in damages to the owner, and has no claim to any reward offered by him for the recovery of the thing, or to any compensation for his trouble or expenses.

Finder to  
notify owner

N. Y. C. C., Sec. 939.

SEC. 1866. The finder of a thing may, in good faith, before giving it up, require reasonable proof of ownership from any person claiming it.

Claimant to  
prove own-  
ership.

N. Y. C. C., Sec. 940.

SEC. 1867. The finder of a thing is entitled to compensation for all expenses necessarily incurred by him in its preservation, and for any other service necessarily performed by him about it, and to a reasonable reward for keeping it.

Reward, etc.,  
to finder.

N. Y. C. C., Sec. 941.

SEC. 1868. The finder of a thing may exonerate himself from liability at any time, by placing it on storage with any responsible person of good character, at a reasonable expense.

Finder may  
put thing  
found on  
storage.

N. Y. C. C., Sec. 942.

SEC. 1869. The finder of a thing may sell it, if it is a thing which is commonly the subject of sale, when the owner cannot, with reasonable diligence, be found, or, being found, refuses upon demand to pay the lawful charges of the finder, in the following cases:

When finder  
may sell the  
thing found.

1. When the thing is in danger of perishing, or of losing the greater part of its value; or,
2. When the lawful charges of the finder amount to two-thirds of its value.

N. Y. C. C., Sec. 943.

SEC. 1870. A sale under the provisions of the last section must be made in the same manner as the sale of a thing pledged.

How sale is  
to be made.

For the rules governing such a sale, see the chapter on Pledge.

N. Y. C. C., Sec. 944.

Surrender  
of thing to  
the finder.

SEC. 1871. The owner of a thing found may exonerate himself from the claims of the finder by surrendering it to him in satisfaction thereof.

This provision cannot be supported by the citation of any positive authority, but seems proper, in order to prevent owners from being made responsible for excessive expenses.

N. Y. C. C., Sec. 945.

Thing abandoned

SEC. 1872. The provisions of this article have no application to things which have been intentionally abandoned by their owners.

N. Y. C. C., Sec. 946.

### CHAPTER III.

#### DEPOSIT FOR EXCHANGE.

SECTION 1878. Relations of the parties.

Relations of  
the parties.

SEC. 1878. A deposit for exchange transfers to the depositary the title to the thing deposited, and creates between him and the depositor the relation of debtor and creditor merely.

N. Y. C. C., Sec. 947.

### TITLE IV.

#### LOAN.

##### CHAPTER I. LOAN FOR USE.

##### II. LOAN FOR EXCHANGE.

##### III. LOAN OF MONEY.

#### CHAPTER I.

##### LOAN FOR USE.

SECTION 1884. Loan, what.

1885. Title to property lent.

1886. Care required of borrower.

1887. Same.

1888. Degree of skill.

SECTION 1889. Borrower, when to repair injuries.

1890. Use of thing lent.

1891. Relending, forbidden.

1892. Borrower, when to bear expenses.

1893. Lender liable for defects.

1894. Lender may require return of thing lent.

1895. When returnable without demand.

1896. Place of return.

SEC. 1884. A loan for use is a contract by which one gives to another the temporary possession and use of personal property, and the latter agrees to return the same thing to him at a future time, without reward for its use. Loan, what.

N. Y. C. C., Sec. 948.

SEC. 1885. A loan for use does not transfer the title to the thing; and all its increase during the period of the loan belongs to the lender. Title to property lent.

N. Y. C. C., Sec. 949.

SEC. 1886. A borrower for use must use great care for the preservation in safety and in good condition of the thing lent. Care required of borrower.

N. Y. C. C., Sec. 950.

SEC. 1887. One who borrows a living animal for use, must treat it with great kindness, and provide everything necessary and suitable for it. Same.

N. Y. C. C., Sec. 951.

SEC. 1888. A borrower for use is bound to have and to exercise such skill in the care of the thing lent as he causes the lender to believe him to possess. Degree of skill.

N. Y. C. C., Sec. 952.

SEC. 1889. A borrower for use must repair all deteriorations or injuries to the thing lent, which are occasioned by his negligence, however slight. Borrower, when to repair injuries.

N. Y. C. C., Sec. 953.

SEC. 1890. The borrower of a thing for use may use it for such purposes only as the lender might reasonably anticipate at the time of lending. Use of thing lent.

N. Y. C. C., Sec. 954.

SEC. 1891. The borrower of a thing for use must not part with it to a third person, without the consent of the lender. Relending, forbidden.

N. Y. C. C., Sec. 955.

Borrower,  
when to bear  
expenses.

SEC. 1892. The borrower of a thing for use must bear all its expenses during the loan, except such as are necessarily incurred by him to preserve it from unexpected and unusual injury. For such expenses he is entitled to compensation from the lender, who may, however, exonerate himself by surrendering the thing to the borrower.

N. Y. C. C., Sec. 956.

Lender lia-  
ble for de-  
fects.

SEC. 1893. The lender of a thing for use must indemnify the borrower for damage caused by defects or vices in it, which he knew at the time of lending, and concealed from the borrower.

N. Y. C. C., Sec. 957.

Lender may  
require  
return of  
thing lent.

SEC. 1894. The lender of a thing for use may at any time require its return, even though he lent it for a specified time or purpose. But if, on the faith of such an agreement, the borrower has made such arrangements that a return of the thing before the period agreed upon would cause him loss, exceeding the benefit derived by him from the loan, the lender must indemnify him for such loss, if he compels such return, the borrower not having in any manner violated his duty.

N. Y. C. C., Sec. 958.

When re-  
turnable  
without de-  
mand.

SEC. 1895. If a thing is lent for use for a specified time or purpose, it must be returned to the lender without demand, as soon as the time has expired, or the purpose has been accomplished. In other cases it need not be returned until demanded.

N. Y. C. C., Sec. 959.

Place of  
return.

SEC. 1896. The borrower of a thing for use must return it to the lender, at the place contemplated by the parties at the time of lending; or if no particular place was so contemplated by them, then at the place where it was at that time.

N. Y. C. C., Sec. 960.

## CHAPTER II.

## LOAN FOR EXCHANGE.

SECTION 1902. Loan for exchange, what.

1903. Same.

1904. Title to property lent.

1905. Contract cannot be modified by lender.

1906. Certain sections applicable.

SEC. 1902. A loan for exchange is a contract by which one delivers personal property to another, and the latter agrees to return to the lender a similar thing at a future time, without reward for its use.

Loan for  
exchange,  
what.

N. Y. C. C., Sec. 961.

SEC. 1903. A loan, which the borrower is allowed by the lender to treat as a loan for use, or for exchange, at his option, is subject to all the provisions of this chapter.

Same.

N. Y. C. C., Sec. 962.

SEC. 1904. By a loan for exchange the title to the thing lent is transferred to the borrower, and he must bear all its expenses, and is entitled to all its increase.

Title to  
property  
lent.

N. Y. C. C., Sec. 963.

SEC. 1905. A lender for exchange cannot require the borrower to fulfil his obligations at a time, or in a manner, different from that which was originally agreed upon.

Contract  
cannot be  
modified by  
lender.

This follows from the nature of the contract. It is, in fact, simply an executory exchange.

N. Y. C. C., Sec. 964.

SEC. 1906. Secs. 1893, 1895 and 1896, apply to a loan for exchange.

Certain sec-  
tions appli-  
cable.

## CHAPTER III.

## LOAN OF MONEY.

NOTE.—Originally, no interest was allowed upon a loan of money. But with the progress of business, it became necessary, and the transaction thus entered into, although in strictness a hiring, is universally known as a loan. This use of the word having obtained so long, it would be idle to attempt to change it.

## SECTION 1912. Loan of money.

1913. Loan to be repaid in current money.

1914. Loan may be for reward.

1915. Interest, what.

1916. Annual rate.

1917. Legal interest.

1918. Same.

1919. Interest becomes part of principal, when.

1920. Interest on judgment.

Loan of  
money.

SEC. 1912. A loan of money is a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed. A loan for mere use is governed by the chapter on *Loan for Use*.

N. Y. C. C., Sec. 966.

Loan to be  
repaid in  
current  
money.

SEC. 1913. A borrower of money must pay the amount due in such money as is current at the time when the loan becomes due, whether such money is worth more or less than the actual money lent.

N. Y. C. C., Sec. 967.

Loan may be  
for reward.

SEC. 1914. A loan of money may be made with or without reward, but is presumed to be made for reward.

N. Y. C. C., Sec. 968.

Interest,  
what.

SEC. 1915. Reward for the loan, forbearance or use of money, or its equivalent, is called interest.

N. Y. C. C., Sec. 969.

Annual rate.

SEC. 1916. When a rate of interest is prescribed by a law or contract, without specifying the period of time by which such rate is to be calculated, it is to be deemed an annual rate.

N. Y. C. C., Sec. 970.

Legal  
interest.

SEC. 1917. Under an obligation to pay interest, no rate being specified, interest is payable at the rate of ten per cent. per annum, and in like proportion for a longer or shorter time; but in the computation of interest for less than a year, three hundred and sixty days are deemed to constitute a year.

N. Y. C. C., Sec. 971; Stats. 1868, 553, Sec. 7; 1870, 199, Sec. 1.

Same.

SEC. 1918. Parties may agree in writing for the payment of any rate of interest, and it shall be allowed, ac-

according to the terms of the agreement, until the entry of judgment.

Stats. 1868, 553, Sec. 2 ; 1870, 699, Sec. 1.

SEC. 1919. The parties may, in any contract in writing, whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid, it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt.

Interest becomes part of principal, when.

Stats. 1850, 92, Sec. 3.

SEC. 1920. No judgment in any Court of this State shall draw interest at a rate to exceed seven per cent. per annum. Interest must not be compounded in any manner or form, on a judgment.

Interest on judgment.

## TITLE V.

### HIRING.

- CHAPTER I. HIRING IN GENERAL.  
 II. HIRING OF REAL PROPERTY.  
 III. HIRING OF PERSONAL PROPERTY.

### CHAPTER I.

#### HIRING IN GENERAL.

- SECTION 1925. Hiring, what.  
 1926. Products of thing.  
 1927. Quiet possession.  
 1928. Degree of care, etc., on part of hirer.  
 1929. Must repair injuries, etc.  
 1930. Thing let for a particular purpose.  
 1931. When letter may terminate the hiring.  
 1932. When hirer may terminate the hiring.  
 1933. When hiring terminates.  
 1934. When terminated by death, etc., of party.  
 1935. Apportionment of hire.

SEC. 1925. Hiring is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time.

Hiring, what.

N. Y. C. C., Sec. 979.

Products of  
thing.

**SEC. 1926.** The products of a thing hired, during the hiring, belong to the hirer.

N. Y. C. C., Sec. 980.

Quiet  
possession.

**SEC. 1927.** An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same.

N. Y. C. C., Sec. 981.

Degree of  
care, etc., on  
part of hirer.

**SEC. 1928.** The hirer of a thing must use ordinary care for its preservation in safety and in good condition.

N. Y. C. C., Sec. 982.

Must repair  
injuries, etc.

**SEC. 1929.** The hirer of a thing must repair all deteriorations or injuries thereto, occasioned by his ordinary negligence.

N. Y. C. C., Sec. 983.

Thing let for  
a particular  
purpose.

**SEC. 1930.** When a thing is let for a particular purpose, the hirer must not use it for any other purpose; and if he does, the letter may hold him responsible for its safety during such use, in all events, or may treat the contract as thereby rescinded.

N. Y. C. C., Sec. 984.

When letter  
may termi-  
nate the  
hiring.

**SEC. 1931.** The letter of a thing may terminate the hiring, and reclaim the thing, before the end of the term agreed upon—

1. When the hirer uses, or permits a use of the thing hired, in a manner contrary to the agreement of the parties; or,

2. When the hirer does not, within a reasonable time after request, make such repairs as he is bound to make.

N. Y. C. C., Sec. 985.

When hirer  
may termi-  
nate the  
hiring.

**SEC. 1932.** The hirer of a thing may terminate the hiring before the end of the term agreed upon—

1. When the letter does not, within a reasonable time after request, fulfil his obligations, if any, as to placing and securing the hirer in the quiet possession of the thing hired, or putting it into good condition, or repairing; or,

2. When the greater part of the thing hired, or that part which was, and which the letter had, at the time of



the hiring, reason to believe was, the material inducement to the hirer to enter into the contract, perishes from any other cause than the ordinary negligence of the hirer.

N. Y. C. C., Sec. 986.

Sec. 1933. The hiring of a thing terminates—

When hiring terminates.

1. At the end of the term agreed upon.
2. By the mutual consent of the parties.
3. By the hirer acquiring a title to the thing hired, superior to that of the letter; or,
4. By the destruction of the thing hired.

N. Y. C. C., Sec. 987.

Sec. 1934. If the hiring of a thing is terminable at the pleasure of one of the parties, it is terminated by notice to the other of his death or incapacity to contract. In other cases it is not terminated thereby.

When terminated by death, etc., of party.

N. Y. C. C., Sec. 988.

Sec. 1935. When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him.

Apportionment of hire.

N. Y. C. C., Sec. 989.

## CHAPTER II.

### HIRING OF REAL PROPERTY.

SECTION 1941. Lessor to make dwelling house fit for its purpose.

1942. When lessee may make repairs, etc.

1943. Term of hiring when no limit is fixed.

1944. Hiring of lodgings for indefinite term.

1945. Renewal of lease by lessee's continued possession.

1946. Notice to quit.

1947. Rent, when payable.

1948. Tenant must deliver notice served on him.

1949. Letting parts of rooms forbidden.

Sec. 1941. The lessor of a building intended for the occupation of human beings must put it into a condition fit for that purpose, and must repair all subsequent dilapidations thereof, except such as are mentioned in Sec. 1929.

Lessor to make dwelling house fit for its purpose.

This section changes the rule upon this subject to conform to that which, notwithstanding steady judicial adherence for hundreds of years to the adverse doctrine, is generally believed by the unprofessional public to be law, and upon which basis they almost always contract. The very fact that there are repeated decisions to the contrary, down to the year 1861, shows that the public do not and cannot understand their justice, or even realize their existence. So familiar a point of law could not rise again and again for adjudication, were it not that the community at large revolt at every application of the rule. A partial reform has been effected by the Legislature in suspending the rent of houses destroyed or injured, in certain cases (Laws 1866, Chap. 345), and it ought to be carried still further.

N. Y. C. C., Sec. 990.

When lessee  
may make  
repairs, etc.

SEC. 1942. If, within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, and deduct the expense of such repairs from the rent, or otherwise recover it from the lessor.

N. Y. C. C., Sec. 991.

Term of  
hiring when  
no limit is  
fixed.

SEC. 1943. A hiring of real property, other than lodgings [and dwelling houses], in places where there is no usage on the subject, is presumed to be for one year from its commencement [unless otherwise expressed in the hiring].

N. Y. C. C., Sec. 992.

Hiring of  
lodgings for  
indefinite  
term.

SEC. 1944. A hiring of lodgings [or a dwelling house] for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly.

N. Y. C. C., Sec. 993.

Renewal of  
lease by  
lessee's  
continued  
possession.

SEC. 1945. If a lessee of real property remains in possession thereof, after the expiration of the hiring, and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year.

N. Y. C. C., Sec. 994.

Notice to  
quit.

SEC. 1946. A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in the last section, at the end of the term implied by law, unless one of the parties gives notice to the other of his

intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding one month.

N. Y. C. C., Sec. 995.

SEC. 1947. When there is no usage or contract to the contrary, rents are payable at the termination of the holding, when it does not exceed one year. If the holding is by the day, week, month, quarter or year, rent is payable at the termination of the respective periods, as it successively becomes due.

Rent, when payable.

[New section.] NOTE.—Substitute for Sec. 996 of the New York Civil Code.

SEC. 1948. Every tenant who receives notice of any proceeding to recover the real property occupied by him, or the possession thereof, must immediately inform his landlord of the same.

Tenant must deliver notice served on him.

N. Y. C. C., Sec. 997.

SEC. 1949. One who hires part of a room for a dwelling is entitled to the whole of the room, notwithstanding any agreement to the contrary; and if a landlord lets a room as a dwelling for more than one family, the person to whom he first lets any part of it is entitled to the possession of the whole room for the term agreed upon, and every tenant in the building, under the same landlord, is relieved from all obligation to pay rent to him.

Letting parts of rooms forbidden.

This provision is intended to prevent one of the chief abuses of tenement houses. Mere penalties, whether civil or criminal, are not likely to be enforced. But the loss of rent would be a punishment that could be enforced by way of defence to an action.

N. Y. C. C., Sec. 998.

## CHAPTER III.

### HIRING OF PERSONAL PROPERTY.

SECTION 1955. Obligations of letter of personal property.

1956. Ordinary expenses.

1957. Extraordinary expenses.

1958. Return of thing hired.

1959. Charter party, what.

Obligations  
of letter of  
personal  
property.

SEC. 1955. One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer, and not the natural result of its use.

N. Y. C. C., Sec. 999.

Ordinary  
expenses.

SEC. 1956. A hirer of personal property must bear all such expenses concerning it as might naturally be foreseen to attend it during its use by him. All other expenses must be borne by the letter.

N. Y. C. C., Sec. 1000.

Extraordi-  
nary ex-  
penses.

SEC. 1957. If a letter fails to fulfil his obligations, as prescribed by Sec. 1956, the hirer, after giving him notice to do so, if such notice can conveniently be given, may expend any reasonable amount necessary to make good the letter's default, and may recover such amount from him.

N. Y. C. C., Sec. 1001.

Return of  
thing hired.

SEC. 1958. At the expiration of the term for which personal property is hired, the hirer must return it to the letter at the place contemplated by the parties at the time of hiring, or, if no particular place was so contemplated by them, at the place which it was at that time.

N. Y. C. C., Sec. 1002.

Charter  
party, what.

SEC. 1959. The contract by which a ship is let is termed a charter party. By it the owner may either let the capacity or burden of the ship, continuing the employment of the owner's master, crew and equipments, or may surrender the entire ship to the charterer, who then provides them himself. The master or a part owner may be a charterer.

N. Y. C. C., Sec. 1003.

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## TITLE VI.

### SERVICE.

#### CHAPTER I. SERVICE WITH EMPLOYMENT.

#### II. PARTICULAR EMPLOYMENTS.

#### III. SERVICE WITHOUT EMPLOYMENT.

## CHAPTER I.

## SERVICE WITH EMPLOYMENT.

- ARTICLE I. DEFINITION OF EMPLOYMENT.  
 II. OBLIGATIONS OF THE EMPLOYER.  
 III. OBLIGATIONS OF THE EMPLOYÉ.  
 IV. TERMINATION OF EMPLOYMENT.

## ARTICLE I.

## DEFINITION OF EMPLOYMENT.

SECTION 1965. Employment, what.

SEC. 1965. The contract of employment is a contract by which one, who is called the employer, engages another, who is called the employé, to do something for the benefit of the employer, or of a third person.

Employment, what.

The scope of this chapter is not confined to servants, but includes factors, brokers, carriers, agents, and all similar classes of persons.

N. Y. C. C., Sec. 1004.

## ARTICLE II.

## OBLIGATIONS OF THE EMPLOYER.

SECTION 1969. When employer must indemnify employé.

1970. When not.

1971. Employer to indemnify for his own negligence.

SEC. 1969. An employer must indemnify his employé, except as prescribed in the next section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employé, at the time of obeying such directions, believed them to be unlawful.

When employer must indemnify employé.

N. Y. C. C., Sec. 1005.

SEC. 1970. An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risk of the business in which he is em-

When not.

ployed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé.

N. Y. C. C., Sec. 1006.

Employer  
to indemnify  
for his own  
negligence.

SEC. 1971. An employer must in all cases indemnify his employé for losses caused by [the former's] want of ordinary care.

N. Y. C. C., Sec. 1007.

NOTE.—"The former's," in brackets, substituted for "his own."

### ARTICLE III.

#### OBLIGATIONS OF THE EMPLOYÉ.

##### SECTION 1975. Duties of gratuitous employé.

- 1976. Same.
- 1977. Same.
- 1978. Duties of employé for reward.
- 1979. Duties of employé for his own benefit.
- 1980. Contracts for service limited to two years.
- 1981. Employé must obey employer.
- 1982. Employé to conform to usage.
- 1983. Degree of skill required.
- 1984. Must use what skill he has.
- 1985. What belongs to employer.
- 1986. Duty to account.
- 1987. Employé not bound to deliver without demand.
- 1988. Preference to be given to employers.
- 1989. Responsibility of employé for substitute.
- 1990. Responsibility for negligence.
- 1991. Surviving employé.
- 1992. Confidential employment.

Duties of  
gratuitous  
employé.

SEC. 1975. One who, without consideration, undertakes to do a service for another, is not bound to perform the same, but if he actually enters upon its performance, he must use at least slight care and diligence therein.

N. Y. C. C., Sec. 1008.

Same.

SEC. 1976. One who, by his own special request, induces another to intrust him with the performance of a service, must perform the same fully. In other cases, one who undertakes a gratuitous service may relinquish it at any time.

This distinction is recognized by the civil law, but it is not clear that it is admitted by the common law. There is good reason for it, since a volunteer of this kind might seriously mislead one who relied upon him, and who would otherwise have employed some one else for a compensation, and thus have been sure of the service he required.

N. Y. C. C., Sec. 1009.

SEC. 1977. A gratuitous employé, who accepts a written power of attorney, must act under it so long as it remains in force, or until he gives notice to his employer that he will not do so. Same.

Code La., 2971. This provision is new to the common law; but is founded upon justice. By retaining the instrument, the attorney keeps in his hands a power which he may use to the detriment of his principal, and misleads the latter into the belief that he will use it for his benefit.

N. Y. C. C., Sec. 1010.

SEC. 1978. One who, for a good consideration, agrees to serve another, must perform the service, and must use ordinary care and diligence therein, so long as he is thus employed. Duties of employé for reward.

N. Y. C. C., Sec. 1011.

SEC. 1979. One who is employed at his own request to do that which is more for his own advantage than for that of his employer, must use great care and diligence therein to protect the interest of the latter. Duties of employé for his own benefit.

N. Y. C. C., Sec. 1012.

SEC. 1980. A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on *Master and Servant*, cannot be enforced against the employé beyond the term of two years from the commencement of service under it, but if the employé voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation. Contracts for services limited to two years.

N. Y. C. C., Sec. 1013.

SEC. 1981. An employé must substantially comply with all the directions of his employer concerning the service on which he is engaged, even though contrary to the provisions of this Title, except where such obedience is impossible, or unlawful, or would impose new and unreasonable burdens upon the employé, or in case of an emergency which, according to the best information which the employé can with reasonable diligence obtain, Employé must obey employer.

the employer did not contemplate, in which he cannot, with reasonable diligence, be consulted, and in which non-compliance is judged by the employé, in good faith, and in the exercise of reasonable discretion, to be absolutely necessary for the protection of the employer's interests. In all such cases, the employé must conform as nearly to the directions of his employer as may be reasonably practicable, and most for the interest of the latter.

N. Y. C. C., Sec. 1014.

Employé to conform to usage.

SEC. 1982. An employé must perform his service in conformity to the usage of the place of performance, unless otherwise directed by his employer, or unless it is impracticable, or manifestly injurious to his employer to do so.

Story on Agency, Sec. 199; *Johnson vs. N. Y. Central R. R.*, 31 Barb., 196; see *Horton vs. Morgan*, 19 N. Y., 170.

N. Y. C. C., Sec. 1015.

Degree of skill required.

SEC. 1983. An employé is bound to exercise a reasonable degree of skill, unless his employer has notice, before employing him, of his want of skill.

N. Y. C. C., Sec. 1016.

Must use what skill he has.

SEC. 1984. An employé is always bound to use such skill as he possesses.

*Wilson vs. Brett*, 11 M. & W., 113.

N. Y. C. C., Sec. 1017.

What belongs to employer.

SEC. 1985. Everything which an employé acquires by virtue of his employment, except the compensation, if any, which is due to him from his employer, belongs to the latter, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.

Code La., 2074; see *Tenant vs. Elliott*, 1 Bos. & P., 3; *Farmer vs. Russell*, id., 296; *Donsfield vs. Wilson*, 10 M. & W., 185; *Edmondstone vs. Hartshorne*, 19 N. Y., 9.

N. Y. C. C., Sec. 1018.

Duty to account.

SEC. 1986. An employé must, on demand, render to his employer just accounts of all his transactions in the course of his service, as often as may be reasonable, and must, without demand, give prompt notice to his employer of everything which he receives for his account.

Story on Agency, Sec. 203; *Collyer vs. Dudley*, Turn. & Russ., 421; by *Duer, J.*, *Heubach vs. Mollmann*, 3 Deer. 227, 252; see *Edmondstone vs. Hartshorne*, 19 N. Y., 9.

N. Y. C. C., Sec. 1019.



SEC. 1987. An employé who receives anything on account of his employer, in any capacity other than that of a mere servant, is not bound to deliver it to him until demanded, and is not at liberty to send it to him from a distance, without demand, in any mode involving greater risk than its retention by the employé himself.

Employé not bound to deliver without demand.

N. Y. C. C., Sec. 1020.

SEC. 1988. An employé who has any business to transact on his own account, similar to that intrusted to him by his employer, must always give the latter the preference. If intrusted with similar affairs by different employers, he must give them preference according to their relative urgency, or, other things being equal, according to the order in which they were committed to him.

Preference to be given to employers

There is no direct authority for these provisions, but they are required by sound principle.

N. Y. C. C., Sec. 1021.

SEC. 1989. An employé, who is expressly authorized to employ a substitute, is liable to his principal only for want of ordinary care in his selection. The substitute is directly responsible to the principal.

Responsibility of employé for substitute.

N. Y. C. C., Sec. 1022.

SEC. 1990. An employé, who is guilty of a culpable degree of negligence, is liable to his employer for the damage thereby caused to the latter; and the employer is liable to him, if the service is not gratuitous, for the value of such services only as are properly rendered.

Responsibility for negligence.

N. Y. C. C., Sec. 1023.

SEC. 1991. Where service is to be rendered by two or more persons jointly, and one of them dies, the survivor must act alone, if the service to be rendered is such as he can rightly perform without the aid of the deceased person, but not otherwise.

Surviving employé.

N. Y. C. C., Sec. 1024.

SEC. 1992. The obligations peculiar to confidential employments are defined in the Title on *Trusts*.

Confidential employment

N. Y. C. C., Sec. 1025.

## ARTICLE IV.

## TERMINATION OF EMPLOYMENT.

SECTION 1996. Termination by death, etc., of employer.

1997. Employment, how terminated.

1998. Continuance of service in certain cases.

1999. Termination at will.

2000. Termination by employer for fault.

2001. Termination by employé for fault.

2002. Compensation of employé dismissed for cause.

2003. Compensation of employé leaving for cause.

Termination  
by death, etc.,  
of employer.

SEC. 1996. Every employment, in which the power of the employé is not coupled with an interest in its subject, is terminated by notice to him of—

1. The death of the employer; or,
2. His legal incapacity to contract.

This section alters the common law by continuing the power until the agent has notice of the principal's change of condition. Such a rule is advocated by Story (Agency, Sec. 495), and is obviously just.

N. Y. C. C., Sec. 1026.

Employ-  
ment, how  
terminated.

SEC. 1997. Every employment is terminated—

1. By the expiration of its appointed term.
2. By the extinction of its subject.
3. By the death of the employé; or,
4. By his legal incapacity to act as such.

N. Y. C. C., Sec. 1027.

Continuance  
of services  
in certain  
cases.

SEC. 1998. An employé, unless the term of his service has expired, or unless he has a right to discontinue it at any time, without notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employé for such service, according to the terms of the contract of employment.

N. Y. C. C., Sec. 1028.

Termination  
at will.

SEC. 1999. An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this Title.

N. Y. C. C., Sec. 1029.

**SEC. 2000.** An employment, even for a specified term, may be terminated at any time by the employer, in case of any wilful breach of duty by the employé in the course of his employment, or in case of his habitual neglect of his duty or continued incapacity to perform it.

Termination  
by employer  
for fault.

N. Y. C. C., Sec. 1030.

**SEC. 2001.** An employment, even for a specified term, may be terminated by the employé at any time, in case of any wilful or permanent breach of the obligations of his employer to him as an employé, or of the death or incapacity of his employer; subject to the provisions of Sec. 1998.

Termination  
by employé  
for fault.

N. Y. C. C., Sec. 1031.

**SEC. 2002.** An employé, dismissed by his employer for good cause, is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract.

Compensation  
of  
employé  
dismissed  
for cause.

N. Y. C. C., Sec. 1032.

**SEC. 2003.** An employé, who quits the service of his employer for good cause, is entitled to [such proportion of] the compensation which would become due in case of full performance [as the services which he has already rendered bear to the services which he was to render as full performance].

Compensation  
of  
employé  
leaving for  
cause.

N. Y. C. C., Sec. 1033.

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## CHAPTER II.

### PARTICULAR EMPLOYMENTS.

#### ARTICLE I. MASTER AND SERVANT.

##### II. AGENTS.

##### III. FACTORS.

##### IV. SHIPMASTERS.

##### V. MATES AND SEAMEN.

##### VI. SHIPS' MANAGERS.

## ARTICLE I.

## MASTER AND SERVANT.

SECTION 2009. Servant, what.

2010. Term of hiring.

2011. Same.

2012. Renewal of hiring.

2013. Time of service.

2014. Servant to pay over without demand.

2015. When servant may be discharged.

Servant,  
what.

SEC. 2009. A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master.

N. Y. C. C., Sec. 1034.

Term of  
hiring.

SEC. 2010. A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term.

N. Y. C. C., Sec. 1035.

Same.

SEC. 2011. In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed.

Substitute for N. Y. C. C., Sec. 1036.

Renewal  
of hiring.

SEC. 2012. Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service.

N. Y. C. C., Sec. 1037.

Time of  
service.

SEC. 2013. The entire time of a domestic servant belongs to the master; and the time of other servants to such extent as is usual in the business in which they serve, not exceeding in any case ten hours in the day.

N. Y. C. C., Sec. 1038.

Servant to  
pay over  
without  
demand.

SEC. 2014. A servant must deliver to his master, as soon as with reasonable diligence he can find him, every-

thing that he receives for his account, without demand; but he is not bound, without orders from his master, to send anything to him through another person.

N. Y. C. C., Sec. 1039.

Sec. 2015. A master may discharge any servant, other than an apprentice, whether engaged for a fixed term or not—

When  
servant may  
be dis-  
charged.

1. If he is guilty of misconduct in the course of his service, or of gross immorality, though unconnected with the same; or,

2. If, being employed about the person of the master, or in a confidential position, the master discovers that he has been guilty of misconduct, before or after the commencement of his service, of such a nature that, if the master had known or contemplated it, he would not have so employed him.

N. Y. C. C., Sec. 1040.

## ARTICLE II.

### AGENTS.

Section 2019. Agent to conform to his authority.

2020. Must keep his principal informed.

2021. Collecting agent.

2022. Responsibility of sub-agent.

Sec. 2019. An agent must not exceed the limits of his actual authority, as defined by the Title on *Agency*.

N. Y. C. C., Sec. 1041.

Agent to  
conform to  
his authority

Sec. 2020. An agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency.

N. Y. C. C., Sec. 1042.

Must keep  
his principal  
informed.

Sec. 2021. An agent employed to collect a negotiable instrument must collect it promptly, and take all measures necessary to charge the parties thereto, in case of its dishonor; and, if it is a bill of exchange, must present it for acceptance with reasonable diligence.

N. Y. C. C., Sec. 1043.

Collecting  
agent.

Sec. 2022. A mere agent of an agent is not responsible as such to the principal of the latter.

N. Y. C. C., Sec. 1044.

Responsibil-  
ity of sub-  
agent.

## ARTICLE III.

## FACTORS.

SECTION 2026. Factor, what.

2027. Obedience required from factor.

2028. Sales on credit.

2029. Liability of factor under guaranty commission.

2030. Factor cannot relieve himself from liability.

Factor, what - SEC. 2026. A factor is an agent who is employed by another to buy or sell property for him, and is vested by the latter with the possession of the property.

N. Y. C. C., Sec. 1045.

Obedience  
required  
from factor.

SEC. 2027. A factor must obey the instructions of his principal to the same extent as any other employé, notwithstanding any advances he may have made to his principal upon the property consigned to him, except that if the principal forbids him to sell at the market price, he may, nevertheless, sell for his reimbursement, after giving to his principal reasonable notice of his intention to do so, and of the time and place of sale, and proceeding in all respects as a pledgee.

N. Y. C. C., Sec. 1046.

Sales on  
credit.

SEC. 2028. A factor may sell property consigned to him, on such credit as is usual; but, having once agreed with the purchaser upon the term of credit, may not extend it.

N. Y. C. C., Sec. 1047.

Liability of  
factor under  
guaranty  
commission.

SEC. 2029. A factor who charges his principal with a guaranty commission upon a sale, thereby assumes absolutely to pay the price when it falls due, as if it were a debt of his own, and not as a mere guarantor for the purchaser; but he does not thereby assume any additional responsibility for the safety of his remittance of the proceeds.

N. Y. C. C., Sec. 1048.

Factor can-  
not relieve  
himself from  
liability.

SEC. 2030. A factor who receives property for sale, under a general agreement or usage to guarantee the sales or the remittance of the proceeds, cannot relieve himself from responsibility therefor, without the consent of his principal.

N. Y. C. C., Sec. 1049.

## ARTICLE IV.

## SHIPMASTERS.

Section 2034. Appointment of master.

2035. When must be on board.

2036. Pilotage.

2037. Power of master over seamen.

2038. Power of master over passengers.

2039. Impressing private stores.

2040. When may abandon the ship.

2041. Duties on abandonment.

2042. When master cannot trade on his own account.

2043. Care and diligence.

2044. Authority of master.

Sec. 2034. The master of a ship is appointed by the owner, and holds during his pleasure.

Appoint-  
ment of  
master.

N. Y. C. C., Sec. 1050.

Sec. 2035. The master of a ship is bound to be always on board when entering or leaving a port, harbor or river.

When must  
be on board.

N. Y. C. C., Sec. 1051.

Sec. 2036. On entering or leaving a port, harbor or river, the master of a ship must take a pilot if one offers himself, and while the pilot is on board, the navigation of the ship devolves on him.

Pilotage.

N. Y. C. C., Sec. 1052.

NOTE.—Regulations respecting pilots of this State are contained in the Political Code.

Sec. 2037. The master of a ship may enforce the obedience of the mate and seamen to his lawful commands by confinement and other reasonable corporal punishment, not prohibited by Acts of Congress, being responsible for the abuse of his power.

Power of  
master over  
seamen.

N. Y. C. C., Sec. 1053.

Sec. 2038. The master of a ship may confine any person on board, during a voyage, for wilful disobedience to his lawful commands.

Power of  
master over  
passengers.

N. Y. C. C., Sec. 1054.

Sec. 2039. If, during a voyage, the ship's supplies fail, the master, with the advice of the officers, may compel persons who have private supplies on board to surrender

Impressing  
private  
stores.

them for the common want, on payment of their value or giving security therefor.

N. Y. C. C., Sec. 1055.

When may  
abandon the  
ship.

SEC. 2040. The master of a ship must not abandon it during the voyage, without the advice of the other officers.

N. Y. C. C., Sec. 1056.

Duties on  
abandon-  
ment.

SEC. 2041. The master of a ship, upon abandoning it, must carry with him, so far as it is in his power, the money and the most valuable of the goods on board, under penalty of being personally responsible. If the articles thus taken are lost from causes beyond his control, he is exonerated from liability.

N. Y. C. C., Sec. 1057.

When mas-  
ter cannot  
trade on his  
own account.

SEC. 2042. The master of a ship, who engages for a common profit on the cargo, must not trade on his own account, and if he does, he must account to his employer for all profits thus made by him.

N. Y. C. C., Sec. 1058.

Care and  
diligence.

SEC. 2043. The master of a ship must use great care and diligence in the performance of his duties, and is responsible for all damage occasioned by his negligence, however slight.

N. Y. C. C., Sec. 1059.

Authority  
of master.

SEC. 2044. The authority and liability of the master of a ship, as an agent for the owners of the ship and cargo, are regulated by the Title on *Agency*.

N. Y. C. C., Sec. 1060.

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## ARTICLE V.

### MATES AND SEAMEN.

SECTION 2048. Mate, what.

2049. Seamen, what.

2050. Mate and seamen, how engaged and discharged.

2051. Unseaworthy vessel.

2052. Seamen not to lose wages or lien by agreement.

2053. Special agreement with seamen.

2054. Wages depend on freightage.

2055. When wages, etc., begin.

2056. Wages, where voyage is broken up before departure.



**SECTION 2057. Wrongful discharge.**

- 2058. Wages, when not lost by wreck.
- 2059. Certificate.
- 2060. Disabled seamen.
- 2061. Maintenance of seamen during sickness.
- 2062. Death on the voyage.
- 2063. Theft, etc., forfeits wages.
- 2064. Seamen cannot ship goods.
- 2065. Embezzlement and injuries.
- 2066. Law governing seamen.

**SEC. 2048.** The mate of a ship is the officer next in rank to the master, and in case of the master's disability he must take his place. By so doing he does not lose any of his rights as mate. Mate, what.

N. Y. C. C., Sec. 1061.

**SEC. 2049.** All persons employed in the navigation of a ship, or upon a voyage, other than the master and mate, are to be deemed seamen, within the provisions of this Code. Seamen, what.

N. Y. C. C., Sec. 1062.

**SEC. 2050.** The mate and seamen of a ship are engaged by the master, and may be discharged by him at any period of the voyage, for wilful and persistent disobedience or gross disqualification, but cannot otherwise be discharged before the termination of the voyage. Mate and seamen, how engaged and discharged.

N. Y. C. C., Sec. 1063.

**SEC. 2051.** A mate or seaman is not bound to go to sea in a ship that is not seaworthy; and if there is reasonable doubt of its seaworthiness, he may refuse to proceed until a proper survey has been had. Unseaworthy vessel.

N. Y. C. C., Sec. 1064.

**SEC. 2052.** A seaman cannot, by reason of any agreement, be deprived of his lien upon the ship, or of any remedy for the recovery of his wages to which he would otherwise have been entitled. Any stipulation by which he consents to abandon his right to wages in case of the loss of the ship, or to abandon any right he may have or obtain in the nature of salvage, is void. Seaman not to lose wages or lien by agreement.

N. Y. C. C., Sec. 1065.

**SEC. 2053.** No special agreement entered into by a seaman can impair any of his rights, or add to any of his Special agreement with seamen

obligations, as defined by law, unless he fully understands the effect of the agreement, and receives a fair compensation therefor.

N. Y. C. C., Sec. 1066.

Wages  
depend on  
freightage.

SEC. 2054. Except as hereinafter provided, the wages of seamen are due when, and so far only as, freightage is earned, unless the loss of freightage is owing to the fault of the owner or master.

N. Y. C. C., Sec. 1067.

When wages  
etc., begin.

SEC. 2055. The right of a mate or seaman to wages and provisions begins either from the time he begins work, or from the time specified in the agreement for his beginning work, or from his presence on board, whichever first happens.

N. Y. C. C., Sec. 1068.

Wages,  
where voy-  
age is broken  
up before  
departure.

SEC. 2056. Where a voyage is broken up before departure of the ship, the seamen must be paid for the time they have served, and may retain for their indemnity such advances as they have received.

N. Y. C. C., Sec. 1069.

Wrongful  
discharge.

SEC. 2057. When a mate or seaman is wrongfully discharged, or is driven to leave the ship by the cruelty of the master on the voyage, it is then ended with respect to him, and he may thereupon recover his full wages.

N. Y. C. C., Sec. 1070.

Wages when  
not lost by  
wreck.

SEC. 2058. In case of loss or wreck of the ship, a seaman is entitled to his wages up to the time of the loss or wreck, whether freightage has been earned or not, if he exerts himself to the utmost to save the ship, cargo and stores.

This provision is substantially enacted in England (Stats. 7 & 8 Vict., Chap. 112, Sec. 17), making the seaman's right, however, absolutely dependant upon the officer's certificate.

N. Y. C. C., Sec. 1071.

Certificate.

SEC. 2059. A certificate from the master or chief surviving officer of a ship, to the effect that a seaman exerted himself to the utmost to save the ship, cargo and stores, is presumptive evidence of the fact.

N. Y. C. C., Sec. 1072.

**Sec. 2060.** Where a mate or seaman is prevented from rendering service by illness or injury, incurred without his fault in the discharge of his duty on the voyage, or by being wrongfully discharged, or by a capture of the ship, he is entitled to wages notwithstanding; but in case of capture, a ratable deduction for salvage is to be made.

Disabled  
seamen.

N. Y. C. C., Sec. 1073.

**Sec. 2061.** If a mate or seaman becomes sick or disabled during the voyage, without his fault, the expense of furnishing him with suitable medical advice, medicine, attendance, and other provision for his wants, must be borne by the ship till the close of the voyage.

Maintenance  
of seamen  
during sick-  
ness.

N. Y. C. C., Sec. 1074.

**Sec. 2062.** If a mate or seaman dies during the voyage, his personal representatives are entitled to his wages to the time of his death, if he would have been entitled to them had he lived to the end of the voyage.

Death on the  
voyage.

N. Y. C. C., Sec. 1075.

**Sec. 2063.** Desertion of the ship without cause, or a justifiable discharge by the master during the voyage, for misconduct, or a theft of any part of the cargo or appurtenances of the ship, or a wilful injury thereto or to the ship, forfeits all wages due for the voyage to a mate or seaman thus in fault.

Theft, etc.,  
forfeits  
wages.

N. Y. C. C., Sec. 1076.

**Sec. 2064.** A mate or seaman may not, under any pretext, ship goods on his own account without permission from the master.

Seamen  
cannot ship  
goods.

N. Y. C. C., Sec. 1077.

**Sec. 2065.** If any part of the cargo or appurtenances of a ship is embezzled or injured by the mate or a seaman, the offender, or, if it is not known which is the offender, all those of whom negligence or fault may be presumed, must make good the loss.

Embezzle-  
ment and  
injuries.

N. Y. C. C., Sec. 1078.

**Sec. 2066.** The shipment of officers and seamen, and their rights and duties, are further regulated by Acts of Congress.

Law govern-  
ing seamen.

N. Y. C. C., Sec. 1079.

## ARTICLE VI.

## SHIPS' MANAGERS.

SECTION 2070. Manager, what.

2071. Duties of manager.

2072. Compensation.

Manager,  
what.

SEC. 2070. The general agent for the owners, in respect to the care of a ship and freight, is called the manager. If he is a part owner he is also called the managing owner.

N. Y. C. C., Sec. 1080.

Duties of  
manager.

SEC. 2071. Unless otherwise directed, it is the duty of the manager of a ship to provide for the complete seaworthiness of a ship; to take care of it in port; to see that it is provided with necessary papers, with a proper master, mate and crew, and supplies of provisions and stores.

N. Y. C. C., Sec. 1081.

Compensation.

SEC. 2072. A managing owner is presumed to have no right to compensation for his own services.

N. Y. C. C., Sec. 1082.

## CHAPTER III.

## SERVICE WITHOUT EMPLOYMENT.

SECTION 2078. Voluntary interference with property.

2079. Salvage.

Voluntary  
interference  
with prop-  
erty.

SEC. 2078. One who officiously, and without the consent of the real or apparent owner of a thing, takes it into his possession, for the purpose of rendering a service about it, must complete such service, and use ordinary care, diligence and reasonable skill about the same. He is not entitled to any compensation for his service or expenses, except that he may deduct actual and necessary expenses, incurred by him about such service, from any profits which his service has caused the thing to acquire for its owner, and must account to the owner for the residue.

N. Y. C. C., Sec. 1083.

**SEC. 2079.** Any person, other than the master, mate or a seaman thereof, who rescues a ship, her appurtenances or cargo from danger, is entitled to a reasonable compensation therefor, to be paid out of the property saved. He has a lien for such claim, which is regulated by the Title on *Liens*.

N. Y. C. C., Sec. 1084.

## TITLE VII.

### CARRIAGE.

- CHAPTER I. CARRIAGE IN GENERAL.
- II. CARRIAGE OF PERSONS.
- III. CARRIAGE OF PROPERTY.
- IV. CARRIAGE OF MESSAGES.
- V. COMMON CARRIERS.

### CHAPTER I.

#### CARRIAGE IN GENERAL.

**SECTION 2085.** Contract of carriage.

2086. Different kinds of carriers.

2087. Marine and inland carriers, what.

2088. Carriers by sea.

2089. Obligations of gratuitous carriers.

2090. Obligations of gratuitous carrier who has begun to carry.

**SEC. 2085.** The contract of carriage is a contract for the conveyance of property, persons or messages, from one place to another.

Contract of carriage.

N. Y. C. C., Sec. 1085.

**SEC. 2086.** Carriage is either—

1. Inland; or,

2. Marine.

Different kinds of carriers.

N. Y. C. C., Sec. 1086.

**SEC. 2087.** Carriers upon the ocean and upon arms of the sea are marine carriers. All others are inland carriers.

Marine and inland carriers, what.

N. Y. C. C., Sec. 1087.

Carriers  
by sea.

SEC. 2088. Rights and duties peculiar to carriers by sea, are defined by Acts of Congress.

N. Y. C. C., Sec. 1089.

Obligations  
of gratuitous  
carriers.

SEC. 2089. Carriers without reward are subject to the same rules as employes without reward, except so far as is otherwise provided by this Title.

N. Y. C. C., Sec. 1090.

Obligations  
of gratuitous  
carrier who  
has begun  
to carry.

SEC. 2090. A carrier without reward, who has begun to perform his undertaking, must complete it in like manner as if he had received a reward, unless he restores the person or thing carried to as favorable a position as before he commenced the carriage.

N. Y. C. C., Sec. 1091.

## CHAPTER II.

### CARRIAGE OF PERSONS.

#### ARTICLE I. GRATUITOUS CARRIAGE.

##### II. CARRIAGE FOR REWARD.

#### ARTICLE I.

##### GRATUITOUS CARRIAGE OF PERSONS.

###### SECTION 2096. Degree of care required.

Degree of  
care re-  
quired.

SEC. 2096. A carrier of persons without reward must use ordinary care and diligence for their safe carriage.

N. Y. C. C., Sec. 1092.

#### ARTICLE II.

##### CARRIAGE FOR REWARD.

###### SECTION 2100. General duties of carrier.

2101. Vehicles.

2102. Not to overload his vehicle.

2103. Treatment of passengers.

2104. Rate of speed and delays.

General du-  
ties of car-  
rier.

SEC. 2100. A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must

provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.

N. Y. C. C., Sec. 1093.

SEC. 2101. A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care. Vehicles.

N. Y. C. C., Sec. 1094.

SEC. 2102. A carrier of persons for reward must not overcrowd or overload his vehicle. Not to overload his vehicle.

N. Y. C. C., Sec. 1095.

SEC. 2103. A carrier of persons for reward must give to passengers all such accommodations as are usual and reasonable, must treat them with civility, and give them a reasonable degree of attention. Treatment of passengers.

N. Y. C. C., Sec. 1096.

SEC. 2104. A carrier of persons for reward must travel at a reasonable rate of speed, and without any unreasonable delay, or deviation from his proper route. Rate of speed and delays.

N. Y. C. C., Sec. 1097.

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## CHAPTER III.

### CARRIAGE AND PROPERTY.

#### ARTICLE I. GENERAL DEFINITIONS.

##### II. OBLIGATIONS OF THE CARRIER.

##### III. BILL OF LADING.

##### IV. FREIGHTAGE.

##### V. GENERAL AVERAGE.

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#### ARTICLE I.

##### GENERAL DEFINITIONS.

SECTION 2110. Freight, consignor, etc., what.

SEC. 2110. Property carried is called freight, the reward, if any, to be paid for its carriage is called freightage, the person who delivers the freight to the carrier is Freight, consignor, etc., what.

called the consignor, and the person to whom it is to be delivered is called the consignee.

N. Y. C. C., Sec. 1098.

## ARTICLE II.

### OBLIGATIONS OF THE CARRIER.

#### SECTION 2114. Care and diligence required of carriers.

2115. Carrier to obey directions.

2116. Conflict of orders.

2117. Stowage, deviation, etc.

2118. Delivery of freight.

2119. Place of delivery.

2120. Obligations of carrier when freight is not delivered to consignee.

2121. How carrier may terminate his liability.

2122. When consignee cannot be found.

Care and  
diligence  
required of  
carriers.

SEC. 2114. A carrier of property for reward must use at least ordinary care and diligence in the performance of all his duties. A carrier without reward must use at least slight care and diligence.

N. Y. C. C., Sec. 1099.

Carrier to  
obey direc-  
tions.

SEC. 2115. A carrier must comply with the directions of the consignor or consignee, to the same extent that an employé is bound to comply with those of his employer.

N. Y. C. C., Sec. 1100.

Conflict  
of orders.

SEC. 2116. When the directions of a consignor and consignee are conflicting, the carrier must comply with those of the consignor in respect to all matters except the delivery of the freight, as to which he must comply with the directions of the consignee, unless the consignor has specially forbidden the carrier to receive orders from the consignee inconsistent with his own.

N. Y. C. C., Sec. 1101.

Stowage, de-  
viation, etc.

SEC. 2117. A marine carrier must not stow freight upon deck during the voyage, except where it is usual to do so, nor make any improper deviation from or delay in the voyage, nor do any other unnecessary act which would avoid an insurance in the usual form upon the freight.

N. Y. C. C., Sec. 1102.



**SEC. 2118.** A carrier of property must deliver it to the consignee, at the place to which it is addressed, in the manner usual at that place.

Delivery  
of freight.

N. Y. C. C., Sec. 1103.

**SEC. 2119.** If there is no usage to the contrary at the place of delivery, freight must be delivered as follows:

Place of  
delivery.

1. If carried upon a railway owned or managed by the carrier, it may be delivered at the station nearest to the place to which it is addressed.

2. If carried by sea from a foreign country, it may be delivered at the wharf where the ship moors, within a reasonable distance from the place of address; or, if there is no wharf, on board a lighter alongside the ship; or,

3. In other cases, it must be delivered to the consignee or his agent, personally, if either can, with reasonable diligence, be found.

N. Y. C. C., Sec. 1104.

**SEC. 2120.** If, for any reason, a carrier does not deliver freight to the consignee or his agent personally, he must give notice to the consignee of its arrival, and keep the same in safety, upon his responsibility as a carrier, until the consignee has had a reasonable time to remove it.

Obligations  
of carrier  
when freight  
is not deliv-  
ered to con-  
signee.

N. Y. C. C., Sec. 1105.

**SEC. 2121.** If a consignee does not accept and remove freight within a reasonable time after the carrier has fulfilled his obligation to deliver, or duly offered to fulfil the same, the carrier may exonerate himself from further liability by placing the freight in a suitable warehouse, on storage, and giving notice thereof to the consignee.

How carrier  
may ter-  
minate his  
liability.

N. Y. C. C., Sec. 1106.

**SEC. 2122.** If a consignee of freight cannot, with reasonable diligence, be found, the carrier may place it in a suitable warehouse for his account, but must give notice thereof to the consignor.

When con-  
signee can-  
not be found.

N. Y. C. C., Sec. 1107.

## ARTICLE III.

## BILL OF LADING.

SECTION 2126. Bill of lading, what.

2127. Bill of lading negotiable.

2128. Same.

2129. Effect of bill of lading on rights, etc., of carrier.

2130. Bills of lading to be given to consignor.

2131. Carrier exonerated by delivery according to bill of lading.

2132. Carrier may demand surrender of bill of lading before delivery.

Bill of lad-  
ing, what.

SEC. 2126. A bill of lading is an instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place.

N. Y. C. C., Sec. 1108.

Bill of lad-  
ing nego-  
tiable.

SEC. 2127. All the title to the freight which the first holder of a bill of lading had when he received it, passes to every subsequent indorsee thereof in good faith and for value, in the ordinary course of business, with like effect and in like manner as in the case of a bill of exchange.

This provision is conformable to the general intention of merchants, and it is not certain that it is not the law of this State (see *Dows vs. Greene*, 24 N. Y., 638; *Dows vs. Rush*, 28 Barb., 185; but compare *Dows vs. Perrin*, 16 N. Y., 832). A provision, somewhat similar, has been enacted in England (18 & 19 Vict., Chap. 111); and in this State (Laws 1859, Chap. 353).

N. Y. C. C., Sec. 1109.

Same.

SEC. 2128. When a bill of lading is made to "bearer," or in equivalent terms, a simple transfer thereof, by delivery, conveys the same title as an indorsement.

N. Y. C. C., Sec. 1110.

Effect of bill  
of lading on  
rights, etc.,  
of carrier.

SEC. 2129. A bill of lading does not alter the rights or obligations of the carrier, as defined in this chapter, unless it is plainly inconsistent therewith.

N. Y. C. C., Sec. 1111.

Bills of lad-  
ing to be  
given to  
consignor.

SEC. 2130. A carrier must subscribe and deliver to the consignor, on demand, any reasonable number of bills of lading, of the same tenor, expressing truly the original contract for carriage; and if he refuses to do so, the cou-

signor may take the freight from him, and recover from him, besides, all damage thereby occasioned.

N. Y. C. C., Sec. 1112.

SEC. 2131. A carrier is exonerated from liability for freight, by delivery thereof, in good faith, to any holder of a bill of lading therefor, properly indorsed, or made in favor of the bearer.

Carrier exonerated by delivering according to bill of lading

N. Y. C. C., Sec. 1113.

NOTE.—This is a necessary result of Sec. 2127.

SEC. 2132. When a carrier has given a bill of lading, or other instrument substantially equivalent thereto, he may require its surrender, or a reasonable indemnity against claims thereon, before delivering the freight.

Carrier may demand surrender of bill of lading before delivery.

N. Y. C. C., Sec. 1114.

#### ARTICLE IV.

##### FREIGHTAGE.

SECTION 2136. When freightage is to be paid.

2137. Consignor, when liable for freightage.

2138. Consignee, when liable.

2139. Natural increase of freight.

2140. Apportionment by contract.

2141. Same.

2142. Apportionment according to distance.

2143. Freight carried further than agreed, etc.

2144. Carrier's lien for freightage.

SEC. 2136. A carrier may require his freightage to be paid upon his receiving the freight; but if he does not demand it then, he cannot until he is ready to deliver the freight to the consignee.

When freightage is to be paid.

N. Y. C. C., Sec. 1115.

SEC. 2137. The consignor of freight is presumed to be liable for the freightage, but if the contract between him and the carrier provides that the consignee shall pay it, and the carrier allows the consignee to take the freight, he cannot afterwards recover the freightage from the consignor.

Consignor, when liable for freightage.

N. Y. C. C., Sec. 1116.

Consignee,  
when liable.

SEC. 2138. The consignee of freight is liable for the freightage, if he accepts the freight with notice of the intention of the consignor that he should pay it.

N. Y. C. C., Sec. 1117.

Natural in-  
crease of  
freight.

SEC. 2139. No freightage can be charged upon the natural increase of freight.

N. Y. C. C., Sec. 1118.

Apportion-  
ment by  
contract.

SEC. 2140. If freightage is apportioned by a bill of lading or other contract made between a consignor and carrier, the carrier is entitled to payment, according to the apportionment, for so much as he delivers.

N. Y. C. C., Sec. 1119.

Same.

SEC. 2141. If a part of the freight is accepted by a consignee, without a specific objection that the rest is not delivered, the freightage must be apportioned and paid as to that part, though not apportioned in the original contract.

N. Y. C. C., Sec. 1120.

Apportion-  
ment accord-  
ing to dis-  
tance.

SEC. 2142. If a consignee voluntarily receives freight at a place short of the one appointed for delivery, the carrier is entitled to a just proportion of the freightage, according to distance. If the carrier, being ready and willing, offers to complete the transit, he is entitled to the full freightage. If he does not thus offer completion, and the consignee receives the freight only from necessity, the carrier is not entitled to any freightage.

N. Y. C. C., Sec. 1121.

Freight car-  
ried further  
than agreed,  
etc.

SEC. 2143. If freight is carried further, or more expeditiously, than was agreed upon by the parties, the carrier is not entitled to additional compensation, and cannot refuse to deliver it, on the demand of the consignee, at the place and time of its arrival.

N. Y. C. C., Sec. 1122.

Carrier's  
lien for  
freightage.

SEC. 2144. A carrier has a lien for freightage, which is regulated by the Title on *Liens*.

N. Y. C. C., Sec. 1123.

## ARTICLE V.

## GENERAL AVERAGE.

SECTION 2148. Jettison and general average, what.

2149. Order of jettison.

2150. By whom made.

2151. Loss, how borne.

2152. General average loss, how adjusted.

2153. Values, how ascertained.

2154. Things stowed on deck.

2155. Application of the foregoing rules.

SEC. 2148. A carrier by water may, when in case of extreme peril it is necessary for the safety of the ship or cargo, throw overboard, or otherwise sacrifice, any or all of the cargo or appurtenances of the ship. Throwing property overboard for such purpose is called jettison, and the loss incurred thereby is called a general average loss.

Jettison and general average, what.

N. Y. C. C., Sec. 1124.

SEC. 2149. A jettison must begin with the most bulky and least valuable articles, so far as possible.

Order of jettison.

N. Y. C. C., Sec. 1125.

SEC. 2150. A jettison can be made only by authority of the master of a ship, except in case of his disability, or of an overruling necessity, when it may be made by any other person.

By whom made.

N. Y. C. C., Sec. 1126.

SEC. 2151. The loss incurred by a jettison, when lawfully made, must be borne in due proportion by all that part of the ship, appurtenances, freightage and cargo, for the benefit of which the sacrifice is made, as well as by the owner of the thing sacrificed.

Loss, how borne.

N. Y. C. C., Sec. 1127.

SEC. 2152. The proportions in which a general average loss is to be borne must be ascertained by an adjustment, in which the owner of each separate interest is to be charged with such proportion of the value of the thing lost, as the value of his part of the property affected bears to the value of the whole. But an adjustment

General average loss, how adjusted.

made at the end of the voyage, if valid there, is valid everywhere.

N. Y. C. C., Sec. 1128.

Value, how  
ascertained.

SEC. 2153. In estimating values for the purpose of a general average, the ship and appurtenances must be valued as at the end of the voyage, the freightage at one-half the amount due on delivery, and the cargo as at the time and place of its discharge; adding, in each case, the amount made good by contribution.

N. Y. C. C., Sec. 1129.

Things  
stowed on  
deck.

SEC. 2154. The owner of things stowed on deck, in case of their jettison, is entitled to the benefit of a general average contribution only in case it is usual to stow such things on deck upon such a voyage.

N. Y. C. C., Sec. 1130.

Application  
of the fore-  
going rules.

SEC. 2155. The rules herein stated concerning jettison are equally applicable to every other voluntary sacrifice of property on a ship, or expense necessarily incurred, for the preservation of the ship and cargo from extraordinary perils.

N. Y. C. C., Sec. 1131.

## CHAPTER IV.

### CARRIAGE OF MESSAGES.

SECTION 2161. Obligations of carrier of messages.

2162. Degree of care and diligence required.

Obligations  
of carrier of  
messages.

SEC. 2161. A carrier of messages for reward must deliver them at the place to which they are addressed, or to the persons for whom they are intended.

N. Y. C. C., Sec. 1132.

Degree of  
care and  
diligence  
required.

SEC. 2162. A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages. A carrier by telegraph must use the utmost diligence therein.

Obviously, messages are sent by telegraph for the express purpose of securing great dispatch. This is an implied condition of the contract, which should be strictly enforced.

N. Y. C. C., Sec. 1133.

NOTE.—See Secs. 2207 and 540.

## CHAPTER V.

## COMMON CARRIERS.

- ARTICLE I. COMMON CARRIERS IN GENERAL.  
II. COMMON CARRIERS OF PERSONS.  
III. COMMON CARRIERS OF PROPERTY.  
IV. COMMON CARRIERS OF MESSAGES.

## ARTICLE I.

## COMMON CARRIERS IN GENERAL.

SECTION 2168. Common carrier, what.

2169. Obligation to accept freight.

2170. Obligation not to give preference.

2171. What preferences he must give.

2172. Starting.

2173. Compensation.

2174. Obligations of carrier altered only by agreement.

2175. Certain agreements void.

2176. Effect of written contract.

SEC. 2168. Every one who offers to the public to carry persons, property or messages, is a common carrier of whatever he thus offers to carry.

Common carrier, what

N. Y. C. C., Sec. 1134.

SEC. 2169. A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry.

Obligation to accept freight.

N. Y. C. C., Sec. 1135.

SEC. 2170. A common carrier must not give preference, in time, price or otherwise, to one person over another, except where expressly authorized by statute.

Obligation not to give preference.

N. Y. C. C., Sec. 1136.

SEC. 2171. A common carrier must always give a preference in time, and may give a preference in price, to the United States and to this State.

What preference he must give.

N. Y. C. C., Sec. 1137.

SEC. 2172. A common carrier must start at such time and place as he announces to the public.

Starting.

N. Y. C. C., Sec. 1138.

Compensation.

SEC. 2173. A common carrier is entitled to a reasonable compensation and no more, which he may require to be paid in advance. If payment thereof is refused, he may refuse to carry.

N. Y. C. C., Sec. 1139.

Obligations of carrier altered only by agreement.

SEC. 2174. The rights and obligations of a common carrier cannot be altered by notice on his part, or by any other means, except a written agreement between him and the person with whom he deals.

*Nevins vs. Bay State Steamboat Co.*, 4 Bosw., 225; *Cole vs. Goodwin*, 19 Wend., 251; approved. *Dorr vs. N. J. Steam Nav. Co.*, 11 N. Y., 485.

This provision is new, in so far as it requires the agreement to be written; but it seems eminently desirable that such should be the law.

N. Y. C. C., Sec. 1140.

Certain agreements void.

SEC. 2175. A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or wilful wrong of himself or his servants.

*Penn. R. R. vs. McCloskey*, 23 Penn. St., 532; *Camden & Amboy R. R. vs. Baldauff*, 16 id., 67; *Smita vs. N. Y. Central R. R.*, 29 Barb., 142; affirmed, 24 N. Y., 222. The latest cases in this State seem to hold that the carrier may be exempted from such liability for the acts of his servants (*Bissell vs. N. Y. Central R. R.*, 25 N. Y., 442; reversing S. C., 29 Barb., 502; *Perkins vs. N. Y. Central R. R.*, 34 N. Y., 196; *Wells vs. Same*, id., 181). But these decisions were made by a bare majority of the Court of Appeals, and the Commissioners think that the dissenting opinions are entitled to the most weight. It is notorious that the negligence of railroad managers cannot be stopped by criminal prosecutions, and if they are enabled, by a reduction of a few cents in the fare, to escape a civil action, they will be practically irresponsible for the acts of their servants.

N. Y. C. C., Sec. 1141.

Effect of written contract.

SEC. 2176. A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated. But his assent to any other modification of the carrier's rights or obligations contained in such instrument can only be manifested by his signature to the same.

*Nevins vs. Bay State Steamboat Co.*, 4 Bosw., 225. This appears to the Commissioners to be the only sound rule, notwithstanding its apparent repudiation by a bare majority of the Court of Appeals (see *Bissell vs. N. Y. Central R. R.*, 25 N. Y., 442).

N. Y. C. C., Sec. 1142.



## ARTICLE II.

## COMMON CARRIERS OF PERSONS.

## SECTION 2180. Obligation to carry luggage.

2181. Luggage, what.

2182. Liability for luggage.

2183. Luggage, how carried and delivered.

2184. Obligation to provide vehicles.

2185. Seats for passengers.

2186. Regulations for conduct of business.

2187. Fare, when payable.

2188. Ejection of passengers.

2189. Fare not payable after ejection.

2190. Carrier's lien.

SEC. 2180. A common carrier of persons, unless his vehicle is fitted for the reception of passengers exclusively, must receive and carry a reasonable amount of luggage for each passenger, without any charge except for an excess of weight over one hundred pounds to a passenger.

Obligation  
to carry  
luggage.

N. Y. C. C., Sec. 1143.

SEC. 2181. Luggage may consist of any articles intended for the use of a passenger while travelling, or for his personal equipment.

Luggage,  
what.

N. Y. C. C., Sec. 1144.

SEC. 2182. The liability of a carrier for luggage received by him with a passenger is the same as that of a common carrier of property.

Liability for  
luggage.

N. Y. C. C., Sec. 1145.

SEC. 2183. A common carrier must deliver every passenger's luggage, whether within the prescribed weight or not, immediately upon the arrival of the passenger at his destination; and, unless the vehicle would be overcrowded or overloaded thereby, must carry it on the same vehicle by which he carries the passenger to whom it belongs.

Luggage,  
how carried  
and delivered.

N. Y. C. C., Sec. 1146.

SEC. 2184. A common carrier of persons must provide a sufficient number of vehicles to accommodate all the passengers who can be reasonably expected to require carriage at any one time.

Obligation  
to provide  
vehicles.

N. Y. C. C., Sec. 1147.

Seats for  
passengers.

SEC. 2185. A common carrier of persons must provide every passenger with a seat. [He must not overload his vehicle by receiving and carrying more passengers than its rated capacity allows.]

N. Y. C. C., Sec. 1148.

Regulations  
for conduct  
of business.

SEC. 2186. A common carrier of persons may make rules for the conduct of his business, and may require passengers to conform to them, if they are lawful, public, uniform in their application, and reasonable.

N. Y. C. C., Sec. 1149.

Fare, when  
payable.

SEC. 2187. A common carrier may demand the fare of passengers, either at starting or at any subsequent time.

N. Y. C. C., Sec. 1150.

Ejection of  
passengers.

SEC. 2188. A passenger, who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible, and within a short distance from some dwelling house.

N. Y. C. C., Sec. 1151.

Fare not  
payable after  
ejection.

SEC. 2189. After having ejected a passenger, a carrier has no right to require the payment of any part of his fare.

N. Y. C. C., Sec. 1152.

Carrier's  
lien.

SEC. 2190. A common carrier has a lien upon the luggage of a passenger, for the payment of such fare as he is entitled to from him. This lien is regulated by the Title on *Liens*.

N. Y. C. C., Sec. 1153.

### ARTICLE III.

#### COMMON CARRIERS OF PROPERTY.

SECTION 2194. Liability of inland carriers for loss.

2195. When exemptions do not apply.

2196. Liability for delay.

2197. Liability of marine carriers.

2198. Same.

2199. Perils of sea, what.

2200. Consignor of valuables to declare their nature.

2201. Delivery of freight beyond usual route.

2202. Proof to be given in case of loss.

2203. Carrier's services, other than carriage and delivery.

SEC. 2194. Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable, from the time that he accepts until he relieves himself from liability pursuant to Secs. 2118 to 2122, for the loss or injury thereof from any cause whatever, except—

Liability of inland carriers for loss.

1. An inherent defect, vice or weakness, or a spontaneous action, of the property itself.

2. The act of a public enemy of the United States or of this State.

3. The act of the law ; or,

4. Any irresistible superhuman cause.

N. Y. C. C., Sec. 1154.

SEC. 2195. A common carrier is liable, even in the cases excepted by the last section, if his ordinary negligence exposes the property to the cause of the loss.

When exemptions do not apply.

N. Y. C. C., Sec. 1155.

SEC. 2196. A common carrier is liable for delay, only when it is the effect of his ordinary negligence.

Liability for delay.

N. Y. C. C., Sec. 1156.

SEC. 2197. A marine carrier is liable in like manner as an inland carrier, except for loss or injury caused by the perils of the sea or fire.

Liability of marine carriers.

N. Y. C. C., Sec. 1157.

SEC. 2198. The liability of a common carrier by sea is further regulated by Acts of Congress.

Same.

N. Y. C. C., Sec. 1158.

SEC. 2199. Perils of the sea are from—

Perils of sea, what.

1. Storms and waves.

2. Rocks, shoals and rapids.

3. Other obstacles, though of human origin.

4. Changes of climate.

5. The confinement necessary at sea.

6. Animals peculiar to the sea ; and,

7. All other dangers peculiar to the sea.

N. Y. C. C., Sec. 1159.

SEC. 2200. A common carrier of gold, silver, platina or precious stones, or of imitations thereof, in a manufactured or unmanufactured state, of time-pieces of any de-

Consignor of valuables to declare their nature.

scription, of negotiable paper or other valuable writings, of pictures, glass or China ware, is not liable for more than fifty dollars upon the loss or injury of any one package of such articles, unless he has notice, upon his receipt thereof, by mark upon the package or otherwise, of the nature of the freight.

Modified from the English Carriers' Act of 1830. The Act of Congress (March 3, 1851,) does not include so many articles.

N. Y. C. C., Sec. 1160.

Delivery of freight beyond usual route.

SEC. 2201. If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery.

N. Y. C. C., Sec. 1161.

Proof to be given in case of loss.

SEC. 2202. If freight, addressed to a place beyond the usual route of the common carrier who first received it, is lost or injured, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor.

This clause is intended to save the consignor from the risk of mistaken actions, by compelling the carrier to give proof that another is liable, the fair presumption being against him.

N. Y. C. C., Sec. 1162.

Carrier's services, other than carriage and delivery.

SEC. 2203. In respect to any service rendered by a common carrier about freight, other than its carriage and delivery, his rights and obligations are defined by the Titles on *Deposit* and *Service*.

N. Y. C. C., Sec. 1163.

#### ARTICLE IV.

##### COMMON CARRIERS OF MESSAGES.

SECTION 2207. Order of transmission of telegraphic messages.

2208. Order in other cases.

2209. Damages when message is refused or postponed.

Order of transmission of telegraphic messages.

SEC. 2207. A carrier of messages by telegraph must, if it is practicable, transmit every such message immedi-

ately upon its receipt. But if this is not practicable, and several messages accumulate upon his hands, he must transmit them in the following order:

1. Messages from public agents of the United States or of this State, on public business.
2. Messages intended in good faith for immediate publication in newspapers, and not for any secret use.
3. Messages giving information relating to the sickness or death of any person.
4. Other messages, in the order in which they were received.

N. Y. C. C., Sec. 1164.

NOTE.—SECS. 2207, 2209, 2161, 240 and 242 of this Code, must be examined and adjusted.

Sec. 2208. A common carrier of messages, otherwise than by telegraph, must transmit messages in the order in which he receives them, except messages from agents of the United States or of this State, on public business, to which he must always give priority. But he may fix upon certain times for the simultaneous transmission of messages previously received.

Order in other cases.

N. Y. C. C., Sec. 1165.

Sec. 2209. Every person whose message is refused or postponed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto.

Damages when message is refused or postponed.

NEW. Such a provision is needed to protect the rights of parties who are seriously annoyed by delays which nevertheless cannot be shown to have caused them pecuniary damage.

N. Y. C. C., Sec. 1166.

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## TITLE VIII.

### TRUST.

#### CHAPTER I. TRUSTS IN GENERAL.

#### II. TRUSTS FOR THE BENEFIT OF THIRD PERSONS.

## CHAPTER I.

## TRUSTS IN GENERAL.

- ARTICLE I. NATURE AND CREATION OF A TRUST.  
 II. OBLIGATIONS OF TRUSTEES.  
 III. OBLIGATIONS OF THIRD PERSONS.

## ARTICLE I.

## NATURE AND CREATION OF A TRUST.

- SECTION 2215. Trusts classified.  
 2216. Voluntary trust, what.  
 2217. Involuntary trust, what.  
 2218. Parties to the contract.  
 2219. What constitutes one a trustee.  
 2220. For what purpose a trust may be created.  
 2221. Voluntary trust, how created as to trustor.  
 2222. How created as to trustee.  
 2223. Involuntary trustee, who is.  
 2224. Involuntary trust resulting from negligence, etc.

Trusts clas-  
sified.

SEC. 2215. A trust is either—

1. Voluntary; or,
2. Involuntary.

N. Y. C. C., Sec. 1167.

Voluntary  
trust, what.

SEC. 2216. A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by one, for the benefit of another.

A trust is defined by Story as an equitable title to property (Eq. Jur., Sec. 964). But this is a very narrow definition. So far as his obligations are concerned, a technical trustee stands upon the same footing with a confidential agent or adviser, a guardian, etc., and there is little difference, so far as business relations are concerned, between his position and that of a husband, wife, parent, or attorney. The confidence reposed is the essence of the relation, and it will be found, by reference to the numerous cases cited in the course of this Title, that little or no distinction is made between trustees, strictly so called, and any other persons who accept the personal confidence of another.

N. Y. C. C., Sec. 1168.

Involuntary  
trust, what.

SEC. 2217. An involuntary trust is one which is created by operation of law.

N. Y. C. C., Sec. 1169.

Parties to  
the contract.

SEC. 2218. The person whose confidence creates a trust, is called the trustor; the person in whom the con-

confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary.

Lewis, Hill, and other writers, call the creator of the trust the "settlor," a very objectionable word. Trustor is an English word (see Webster's Dictionary, where it is spelled "truster"), and is entirely applicable to the person who creates a trust.

N. Y. C. C., Sec. 1170.

**SEC. 2219.** Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control.

What constitutes one a trustee.

N. Y. C. C., Sec. 1171.

**SEC. 2220.** A trust may be created for any purpose for which a contract may lawfully be made, except as otherwise prescribed by the Titles on *Uses and Trusts* and on *Transfers*.

For what purpose a trust may be created.

N. Y. C. C., Sec. 1172.

**SEC. 2221.** Subject to the provisions of Sec. 852, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty—

Voluntary trust, how created as to trustor.

1. An intention on the part of the trustor to create a trust; and,
2. The subject, purpose and beneficiary of the trust.

N. Y. C. C., Sec. 1173.

**SEC. 2222.** Subject to the provisions of Sec. 852, a voluntary trust is created, as to the trustee, by any words or acts of his, indicating with reasonable certainty—

How created as to trustee.

1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and,
2. The subject, purpose and beneficiary of the trust.

N. Y. C. C., Sec. 1174.

**SEC. 2223.** One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.

Involuntary trustee, who is.

This is a familiar principle of equity in cases of title gained through fraud, mistake, undue influence, or the violation of a trust (*Brown vs. Lynch*, 1 Paige, 147; *Wood vs.*

Rowcliffe, 2 Phil., 382; 3 Hare, 304; see *Anderson vs. Lemon*, 8 N. Y., 236). There seems to be no reason for refusing to extend the rule to all cases of wrongful detention.

N. Y. C. C., Sec. 1175.

Involuntary trust resulting from negligence, etc.

**SEC. 2224.** One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

N. Y. C. C., Sec. 1176.

## ARTICLE II.

### OBLIGATIONS OF TRUSTEES.

**SECTION 2228.** Trustee's obligation to good faith.

2229. Trustee not to use property for his own profit.

2230. Certain transactions forbidden.

2231. Trustee's influence not to be used for his advantage.

2232. Trustee not to assume a trust adverse to interest of beneficiary.

2233. To disclose adverse interest.

2234. Trustee guilty of fraud, when.

2235. Presumption against trustees.

2236. Trustee mingling trust property with his own.

2237. Measure of liability for breach of trust.

2238. Same.

2239. Co-trustees, how far liable for each other.

Trustee's obligation to good faith.

**SEC. 2228.** In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter, by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.

N. Y. C. C., Sec. 1177.

Trustee not to use property for his own profit.

**SEC. 2229.** A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner.

N. Y. C. C., Sec. 1178.

Certain transactions forbidden.

**SEC. 2230.** Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he, or any one for whom he acts as agent, has an interest, present or contingent, adverse to that of his beneficiary, except as follows:



**1.** When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so.

**2.** When, the beneficiary not having capacity to contract, the proper Court, upon the like information of the facts, grants the like permission; or,

**3.** When, some of the beneficiaries having capacity to contract, and some not having it, the former grant permission for themselves, and the proper Court for the latter, in the manner above prescribed.

N. Y. C. C., Sec. 1179.

**SEC. 2231.** A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary.

Trustee's influence not to be used for his advantage.

N. Y. C. C., Sec. 1180.

**SEC. 2232.** No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter.

Trustee not to assume a trust adverse to interest of beneficiary.

N. Y. C. C., Sec. 1181.

**SEC. 2233.** If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed.

To disclose adverse interest.

N. Y. C. C., Sec. 1182.

**SEC. 2234.** Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust.

Trustee guilty of fraud, when.

N. Y. C. C., Sec. 1183.

**SEC. 2235.** All transactions between a trustee and his beneficiary, during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.

Presumption against trustee.

N. Y. C. C., Sec. 1184.

**SEC. 2236.** A trustee who wilfully and unnecessarily mingles the trust property with his own, so as to consti-

Trustee mingling trust property with his own.

tute himself in appearance its absolute owner, is liable for its safety in all events.

N. Y. C. C., Sec. 1185.

Measure of liability for breach of trust.

SEC. 2237. A trustee who uses or disposes of the trust property, contrary to Sec. 2229, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest.

N. Y. C. C., Sec. 1186.

Same.

SEC. 2238. A trustee who uses or disposes of the trust property in any manner not authorized by the trust, but in good faith, and with intent to serve the interests of the beneficiary, is liable only to make good whatever is lost to the beneficiary by his error.

N. Y. C. C., Sec. 1187.

Co-trustees, how far liable for each other.

SEC. 2239. A trustee is responsible for the wrongful acts of a co-trustee, to which he consented, or which by his negligence he enabled the latter to commit; but for no others.

N. Y. C. C., Sec. 1188.

### ARTICLE III.

#### OBLIGATIONS OF THIRD PERSONS.

SECTION 2243. Third person, when involuntary trustee.

2244. When third person must see to application of trust property.

Third person, when involuntary trustee.

SEC. 2243. Every one to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith and for a valuable consideration.

N. Y. C. C., Sec. 1189.

When third person must see to application of trust property.

SEC. 2244. One who actually and in good faith transfers any money or other property to a trustee, as such, is not bound to see to the application thereof, and his rights can in no way be prejudiced by a misapplication thereof by the trustee. Other persons must, at their peril, see to the proper application of money or other property paid or delivered by them.

N. Y. C. C., Sec. 1190.

## CHAPTER II.

## TRUSTS FOR THE BENEFIT OF THIRD PERSONS.

## ARTICLE I. NATURE AND CREATION OF THE TRUST.

## II. OBLIGATIONS OF TRUSTEES.

## III. POWERS OF TRUSTEES.

## IV. RIGHTS OF TRUSTEES.

## V. TERMINATION OF THE TRUST.

## VI. SUCCESSION OR APPOINTMENT OF NEW TRUSTEES.

## ARTICLE I.

## NATURE AND CREATION OF THE TRUST.

SECTION 2250. Who are trustees within scope of this chapter.

2251. Creation of trust.

2252. Trustee appointed by Court.

2253. Declaration of trust.

2254. Same.

Sec. 2250. The provisions of this chapter apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators and guardians, as such.

Who are trustees within scope of this chapter.

N. Y. C. C., Sec. 1191.

Sec. 2251. The mutual consent of a trustor and trustee creates a trust, of which the beneficiary may take advantage at any time prior to its rescission.

Creation of trust.

N. Y. C. C., Sec. 1192.

Sec. 2252. When a trustee is appointed by a Court or public officer, as such, such Court or officer is the trustor, within the meaning of the last section.

Trustee appointed by Court.

N. Y. C. C., Sec. 1193.

Sec. 2253. The nature, extent and object of a trust are expressed in the declaration of trust.

Declaration of trust.

N. Y. C. C., Sec. 1194.

Sec. 2254. All declarations of a trustor to his trustees, in relation to the trust, before its acceptance by the trustees, or any of them, are to be deemed part of the declaration of the trust, except that when a declaration

Same.

of trust is made in writing, all previous declarations by the same trustor are merged therein.

N. Y. C. C., Sec. 1195.

## ARTICLE II.

### OBLIGATIONS OF TRUSTEES.

SECTION 2258. Trustees must obey declaration of trust.

2259. Degree of care and diligence in execution of trust.

2260. Duty of trustee as to appointment of successor.

2261. Investment of money by trustee.

2262. Interest, simple or compound, on omission to invest trust moneys.

2263. Purchase by trustee of claims against trust fund.

Trustee  
must obey  
declaration  
of trust.

SEC. 2258. A trustee must fulfil the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner, and to the same extent, as an employé.

N. Y. C. C., Sec. 1196.

Degree of  
care and  
diligence in  
execution  
of trust.

SEC. 2259. A trustee, whether he receives any compensation or not, must use at least ordinary care and diligence in the execution of his trust.

N. Y. C. C., Sec. 1197.

Duty of trustee  
as to  
appointment  
of successor.

SEC. 2260. If a trustee procures or assents to his discharge from his office, before his trust is fully executed, he must use at least ordinary care and diligence to secure the appointment of a trustworthy successor before accepting his own final discharge.

This provision is new, and is intended to protect beneficiaries from a hasty resort to the Courts in order to shake off the responsibility of a trust; a proceeding by which they have been sometimes irremediably injured; an insolvent and reckless trustee having been appointed in place of an indolent but responsible one.

N. Y. C. C., Sec. 1198.

Investment  
of money by  
trustee.

SEC. 2261. A trustee must invest money received by him under the trust, as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same.

N. Y. C. C., Sec. 1199.

SEC. 2262. If a trustee omits to invest the trust moneys according to the last section, he must pay simple interest thereon, if such omission is negligent merely, and compound interest if it is wilful.

Interest,  
simple or  
compound,  
or omission  
to invest  
trust moneys

N. Y. C. C., Sec. 1200.

SEC. 2263. A trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee; but he may be allowed, by any competent Court, to charge to the trust property what he has in good faith paid for the claim, upon discharging the same.

Purchase  
by trustee  
of claims  
against trust  
fund.

N. Y. C. C., Sec. 1201.

### ARTICLE III

#### POWERS OF TRUSTEES.

SECTION 2267. Trustee's powers as agent.

2268. All must act.

2269. Discretionary powers.

SEC. 2267. A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal.

Trustee's  
powers as  
agent.

N. Y. C. C., Sec. 1202.

SEC. 2268. Where there are several co-trustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides.

All must act.

N. Y. C. C., Sec. 1203.

SEC. 2269. A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper Court if not reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust.

Discretion-  
ary powers.

N. Y. C. C., Sec. 1204.

## ARTICLE IV.

## RIGHTS OF TRUSTEES.

SECTION 2273. Indemnification of trustee.

2274. Compensation of trustee.

2275. Involuntary trustee.

Indemnifica-  
tion of trust-  
tee.

SEC. 2273. A trustee is entitled to the repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust. He is entitled to the repayment of even unlawful expenditures, if they were productive of actual benefit to the estate.

N. Y. C. C., Sec. 1205.

Compensa-  
tion of trust-  
tee.

SEC. 2274. When a declaration of trust is silent upon the subject of compensation, the trustee is entitled to the same compensation as an executor. If it specifies the amount of his compensation, he is entitled to the amount thus specified, and no more. If it directs that he shall be allowed a compensation, but does not specify the rate or amount, he is entitled to such compensation as may be reasonable under the circumstances.

N. Y. C. C., Sec. 1206.

Involuntary  
trustee.

SEC. 2275. An involuntary trustee, who becomes such through his own fault, has none of the rights mentioned in this article.

N. Y. C. C., Sec. 1207.

## ARTICLE V.

## TERMINATION OF THE TRUST.

SECTION 2279. Trust, how extinguished.

2280. Not revocable.

2281. Trustee's office, how vacated.

2282. Trustee, how discharged.

2283. Removal by District Court.

Trust, how  
extinguished

SEC. 2279. A trust is extinguished by the entire fulfilment of its object, or by such object becoming impossible or unlawful.

N. Y. C. C., Sec. 1208.

Not revoca-  
ble.

SEC. 2280. A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee

and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued.

N. Y. C. C., Sec. 1209.

Sec. 2281. The office of a trustee is vacated—

1. By his death; or,
2. By his discharge.

Trustee's  
office, how  
vacated.

N. Y. C. C., Sec. 1210.

Sec. 2282. A trustee can be discharged from his trust only as follows:

Trustee, how  
discharged.

1. By the extinction of the trust.
2. By the completion of his duties under the trust.
3. By such means as may be prescribed by the declaration of trust.
4. By the consent of the beneficiary, if he has capacity to contract.
5. By the judgment of a competent tribunal, in a direct proceeding for that purpose, that he is of unsound mind, or,
6. By the District Court.

N. Y. C. C., Sec. 1211.

Sec. 2283. The District Court may remove any trustee who has violated or is unfit to execute the trust.

Removal by  
District  
Court.

N. Y. C. C., Sec. 1212.

## ARTICLE VI.

### SUCCESSION OR APPOINTMENT OF NEW TRUSTEES.

SECTION 2287. Vacant trusteeship filled by Court.

2288. Survivorship between co-trustees.

2289. District Court as trustee.

Sec. 2287. The District Court may appoint a trustee whenever there is a vacancy, and the declaration of trust does not provide a practicable method of appointment.

Vacant trust-  
eeship filled  
by Court.

N. Y. C. C., Sec. 1213.

Sec. 2288. On the death, renunciation or discharge of one of several co-trustees, the trust survives to the others.

Survivorship  
between co-  
trustees.

Lewin on Trustees, 299; Belmont vs. O'Brien, 12 N. Y., 394. Matter of Van Schoonhoven, 5 Paige, 559; De Peyster vs. Clendinning, 8 id., 295. Matter of Crossman, 29 How. Pr., 350.

N. Y. C. C., Sec. 1214.

District  
Court as  
trustee.

SEC. 2289. When a trust exists without any appointed trustee, or where all the trustees renounce, die or are discharged, the District Court of the county where the trust property, or some portion thereof is situated, must appoint another trustee and direct the execution of the trust.

N. Y. C. C., Sec. 1215; Stats. 1867, 170.

## TITLE IX.

### AGENCY.

#### CHAPTER I. AGENCY IN GENERAL.

##### II. PARTICULAR AGENCIES.

NOTE.—Under this head, the representation of one person by another is the only subject treated. The rights acquired by third persons against both the principal and the agent are here stated. The mutual relations of principal and agent are a branch of *Service*, and are defined in the Title on that subject. So far as these relations create a mutual trust, they are regulated by the Title on *Trust*.

### CHAPTER I.

#### AGENCY IN GENERAL.

##### ARTICLE I. DEFINITION OF AGENCY.

##### II. AUTHORITY OF AGENTS.

##### III. MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

##### IV. OBLIGATIONS OF AGENTS TO THIRD PERSONS.

##### V. DELEGATION OF AGENCY.

##### VI. TERMINATION OF AGENCY.

#### ARTICLE I.

##### DEFINITION OF AGENCY.

SECTION 2295. Agency, what.

2296. Who may appoint and who may be an agent.

2297. Agents, general or special.



Section 2298. Agency, actual or ostensible.

2299. Actual agency.

2300. Ostensible agency.

Sec. 2295. An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency. Agency, what.

N. Y. C. C., Sec. 1216.

Sec. 2296. Any person, having capacity to contract, may appoint an agent; and any person may be an agent. Who may appoint and who may be an agent.

N. Y. C. C., Sec. 1217.

Sec. 2297. An agent for a particular act or transaction is called a special agent. All others are general agents. Agents, general or special.

N. Y. C. C., Sec. 1218.

Sec. 2298. An agency is either actual or ostensible. Agency, actual or ostensible.

N. Y. C. C., Sec. 1219.

Sec. 2299. An agency is actual when the agent is really employed by the principal. Actual agency.

N. Y. C. C., Sec. 1220.

Sec. 2300. An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. Ostensible agency.

N. Y. C. C., Sec. 1221.

## ARTICLE II.

### AUTHORITY OF AGENTS.

Section 2304. What authority may be conferred.

2305. Agent may perform acts required of principal by Code.

2306. Agent cannot have authority to defraud principal.

2307. Creation of agency.

2308. Consideration unnecessary.

2309. Form of authority.

2310. Ratification of agent's act.

2311. Ratification of part of a transaction.

2312. When ratification void.

2313. Ratification not to work injury to third persons.

2314. Rescission of ratification.

2315. Measure of agent's authority.

2316. Actual authority, what.

2317. Ostensible authority, what.

SECTION 2318. Agent's authority as to persons having notice of restrictions upon it.

2319. Agent's necessary authority.

2320. Agent's power to disobey instructions.

2321. Authority to be construed by its specific, rather than by its general terms.

2322. Exceptions to general authority.

2323. What included in authority to sell personal property.

2324. What included in authority to sell real property.

2325. Authority of general agent to receive price of property.

2326. Authority of special agent to receive price.

What authority may be conferred

SEC. 2304. An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention.

N. Y. C. C., Sec. 1222.

Agent may perform acts required of principal by Code

SEC. 2305. Every act which, according to this Code, may be done by or to any person, may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears.

N. Y. C. C., Sec. 1223.

Agent cannot have authority to defraud principal.

SEC. 2306. An agent can never have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom he deals, to be a fraud upon the principal.

N. Y. C. C., Sec. 1224.

Creation of agency.

SEC. 2307. An agency may be created, and an authority may be conferred, by a precedent authorization or a subsequent ratification.

N. Y. C. C., Sec. 1225.

Consideration unnecessary.

SEC. 2308. A consideration is not necessary to make an authority, whether precedent or subsequent, binding upon the principal.

N. Y. C. C., Sec. 1226.

Form of authority.

SEC. 2309. An oral authorization is sufficient for any purpose, except that an authority to enter into a contract [required by law to be in writing] can only be given by an instrument [in writing].

N. Y. C. C., Sec. 1227.

NORM.—The words "under seal" and "under seal," struck out of Sec. 1227 (N. Y. C. C.), and those in brackets inserted, and the second subdivision omitted, as included in this section.

**Sec. 2310.** A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof.

Ratification  
of agent's  
act.

N. Y. C. C., Sec. 1228.

**Sec. 2311.** Ratification of part of an indivisible transaction is a ratification of the whole.

Ratification  
of part of a  
transaction.

N. Y. C. C., Sec. 1229.

**Sec. 2312.** A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act.

When ratifi-  
cation void.

M'Cracken vs. San Francisco, 16 Cal., 591.

N. Y. C. C., Sec. 1230.

**Sec. 2313.** No unauthorized act can be made valid, retroactively, to the prejudice of third persons, without their consent.

Ratification  
not to work  
injury to  
third per-  
sons.

This is, perhaps, a broader rule than at present exists. But great difficulty has been felt in attempting to reconcile the cases (see Story Ag., Secs. 246, 247; Bliss vs. Cottle, 32 Barb., 322; Bird vs. Brown, 4 Exch., 786; Wilson vs. Tammam, 6 M. & G., 236; Palmer vs. Stephens, 1 Denio, 481; Rossiter vs. Rossiter, 8 Wend., 499). In Buron vs. Denman (2 Exch., 167), the defendant had committed a trespass, which the English Government expressly ratified. This was held to relieve the defendant from responsibility. In Lucas vs. Wilkinson (1 H. & N., 420), it was held that an act expressly done on behalf of A could not be ratified and adopted by B, to the prejudice of C.

N. Y. C. C., Sec. 1231.

**Sec. 2314.** A ratification may be rescinded when made without such consent as is required in a contract, or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise.

Rescission of  
ratification.

N. Y. C. C., Sec. 1232.

**Sec. 2315.** An agent has such authority as the principal, actually or ostensibly, confers upon him.

Measure  
of agent's  
authority.

N. Y. C. C., Sec. 1233.

**Sec. 2316.** Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess.

Actual au-  
thority, what

N. Y. C. C., Sec. 1234.

Ostensible  
authority,  
what.

SEC. 2317. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess.

N. Y. C. C., Sec. 1235.

Agent's au-  
thority as  
to persons hav-  
ing notice  
of restric-  
tions upon it.

SEC. 2318. Every agent has actually such authority as is defined by this Title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority.

N. Y. C. C., Sec. 1236.

Agent's  
necessary  
authority.

SEC. 2319. An agent has authority—

1. To do everything necessary, or proper and usual in the ordinary course of business, for effecting the purpose of his agency; and,

2. To make a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made

N. Y. C. C., Sec. 1237.

Agent's  
power to  
disobey in-  
structions.

SEC. 2320. An agent has power to disobey instructions in dealing with the subject of the agency, in cases where it is clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal.

N. Y. C. C., Sec. 1238.

Authority to  
be construed  
by its spe-  
cific, rather  
than by its  
general  
terms.

SEC. 2321. When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned.

N. Y. C. C., Sec. 1239.

Exceptions  
to general  
authority.

SEC. 2322. An authority expressed in general terms, however broad, does not authorize an agent—

1. To act in his own name, unless it is the usual course of business to do so.

2. To define the scope of his agency; or,

3. To do any act which a trustee is forbidden to do by Art. II, of Chap. I, of the last Title.

N. Y. C. C., Sec. 1240.

**Sec. 2323.** An authority to sell personal property includes authority to warrant the title of the principal, and the quality and quantity of the property.

What included in authority to sell personal property.

N. Y. C. C., Sec. 1241.

**Sec. 2324.** An authority to sell and convey real property includes authority to give the usual covenants of warranty [or the Code Covenants].

What included in authority to sell real property.

N. Y. C. C., Sec. 1242.

**Sec. 2325.** A general agent to sell, who is intrusted by the principal with the possession of the thing sold, has authority to receive the price.

Authority of general agent to receive price of property.

N. Y. C. C., Sec. 1243.

**Sec. 2326.** A special agent to sell has authority to receive the price on delivery of the thing sold, but not afterwards.

Authority of special agent to receive price.

N. Y. C. C., Sec. 1244.

### ARTICLE III.

#### MUTUAL OBLIGATIONS OF PRINCIPALS AND THIRD PERSONS.

**SECTION 2330.** Principal, how affected by acts of agent within the scope of his authority.

2331. Principal, when bound by incomplete execution of authority.

2332. Notice to agent, when notice to principal.

2333. Obligation of principal when agent exceeds his authority.

2334. For acts done under a merely ostensible authority.

2335. When exclusive credit is given to agent.

2336. Rights of person who deals with agent without knowledge of his agency.

2337. Principal's responsibility for agent's negligence or omission.

2338. Principal's responsibility for wrongs wilfully committed by the agent.

**Sec. 2330.** An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.

Principal, how affected by acts of agent within the scope of his authority

N. Y. C. C., Sec. 1245.

Principal,  
when bound  
by incom-  
plete execu-  
tion of au-  
thority.

SEC. 2331. A principal is bound by an incomplete execution of an authority, when it is consistent with the whole purpose and scope thereof, but not otherwise.

N. Y. C. C., Sec. 1246.

Notice to  
agent, when  
notice to  
principal.

SEC. 2332. As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

N. Y. C. C., Sec. 1247.

Obligation  
of principal  
when agent  
exceeds his  
authority.

SEC. 2333. When an agent exceeds his authority, his principal is bound by his authorized acts so far only as they can be plainly separated from those which are unauthorized.

N. Y. C. C., Sec. 1248.

For acts  
done under  
a merely  
ostensible  
authority.

SEC. 2334. A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without ordinary negligence, incurred a liability, or parted with value, upon the faith thereof.

N. Y. C. C., Sec. 1249.

When exclu-  
sive credit  
is given to  
agent.

SEC. 2335. If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith, before receiving notice of the creditor's election to hold him responsible.

N. Y. C. C., Sec. 1250.

Rights of  
person who  
deals with  
agent with-  
out knowl-  
edge of his  
agency.

SEC. 2336. One who deals with an agent, without knowing or having reason to believe that the agent acts as such in the transaction, may set off, against any claim of the principal arising out of the same, all claims which he might have set off against the agent before notice of the agency.

N. Y. C. C., Sec. 1251.

NOTE.—The following is Sec. 1252 (and note) of the New York Civil Code:

SEC. 1252. Any instrument within the scope of his authority, whether under seal or not, by which an agent intends to bind his principal, does bind him, if such intent is plainly inferable from the instrument itself.

This section belongs, perhaps, to the general subject of interpretation of contracts. It is intended to abolish the distinction in this respect between sealed and unsealed instruments. See Story Ag., Secs. 147-155.

This Commission has taken a more direct way to abolish the distinction between sealed and unsealed instruments. See Sec. 1096.

**SEC. 2337.** Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in, and as a part of, the transaction of such business, and for his wilful omission to fulfil the obligations of the principal.

Principal's responsibility for agent's negligence or omission.

N. Y. C. C., Sec. 1253.

**SEC. 2338.** A principal is responsible for no other wrongs committed by his agent, than those mentioned in the last section, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service.

Principal's responsibility for wrongs wilfully committed by the agent.

N. Y. C. C., Sec. 1254.

#### ARTICLE IV.

##### OBLIGATIONS OF AGENTS TO THIRD PERSONS.

###### SECTION 2342. Warranty of authority.

2343. Agent's responsibility to third persons.

2344. Obligation of agent to surrender property to third person.

2345. Agent not having capacity to contract.

**SEC. 2342.** One who assumes to act as an agent thereby warrants, to all who deal with him in that capacity, that he has the authority which he assumes.

Warranty of authority.

N. Y. C. C., Sec. 1255.

**SEC. 2343.** One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others:

Agent's responsibility to third persons.

1. When, with his consent, credit is given to him personally in a transaction.

2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or,

3. When his acts are wrongful in their nature.

N. Y. C. C., Sec. 1256.

Obligation  
of agent to  
surrender  
property to  
third person.

SEC. 2344. If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal, in good faith, on account of the same; and is responsible therefor, if, after notice from the owner, he delivers it to his principal.

N. Y. C. C., Sec. 1257.

Agent not  
having ca-  
pacity to  
contract.

SEC. 2345. The provisions of this article are subject to the provisions of Part I, Div. First, of this Code.

N. Y. C. C., Sec. 1258.

## ARTICLE V.

### DELEGATION OF AGENCY.

SECTION 2349. Agent's delegation of his powers.

2350. Agent's unauthorized employment of sub-agent.

2351. Sub-agent rightfully appointed, represents principal.

Agent's del-  
egation of  
his powers.

SEC. 2349. An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:

1. When the act to be done is purely mechanical.
2. When it is such as the agent cannot himself, and the sub-agent can, lawfully perform.
3. When it is the usage of the place to delegate such powers; or,
4. When such delegation is specially authorized by the principal.

N. Y. C. C., Sec. 1259.

Agent's un-  
authorized  
employment  
of sub-agent.

SEC. 2350. If an agent employs a sub-agent without authority, the former is a principal, and the latter his agent, and the principal of the former has no connection with the latter.

N. Y. C. C., Sec. 1260.

Sub-agent  
rightfully  
appointed,  
represents  
principal.

SEC. 2351. A sub-agent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the sub-agent.

N. Y. C. C., Sec. 1261.



## ARTICLE VI.

## TERMINATION OF AGENCY.

SECTION 2355. Termination of agency.

2356. Same.

SEC. 2355. An agency is terminated, as to every person having notice thereof, by— Termination of agency.

1. The expiration of its term.
2. The extinction of its subject.
3. The death of the agent.
4. His renunciation of the agency ; or,
5. The incapacity of the agent to act as such.

N. Y. C. C., Sec. 1262.

SEC. 2356. Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by— Same.

1. Its revocation by the principal.
2. His death ; or,
3. His incapacity to contract.

N. Y. C. C., Sec. 1263.

## CHAPTER II.

## PARTICULAR AGENCIES.

ARTICLE I. AUCTIONEERS.

II. FACTORS.

III. SHIPMASTERS AND PILOTS.

IV. SHIPS' MANAGERS.

## ARTICLE I.

## AUCTIONEERS.

SECTION 2362. Auctioneer's authority from the seller.

2363. Auctioneer's authority from the bidder.

SEC. 2362 An auctioneer, in the absence of special authorization or usage to the contrary, has authority from the seller, only as follows : Auctioneer's authority from the seller.

1. To sell by public auction to the highest bidder.
2. To sell for cash only, except such articles as are usually sold on credit at auction.

3. To warrant, in like manner with other agents to sell, according to Sec. 2323.

4. To prescribe reasonable rules and terms of sale.

5. To deliver the thing sold, upon payment of the price.

6. To collect the price; and,

7. To do whatever else is necessary, or proper and usual, in the ordinary course of business, for effecting these purposes.

N. Y. C. C., Sec. 1264.

Auctioneer's  
authority  
from the  
bidder.

SEC. 2363. An auctioneer has authority from a bidder at the auction, as well as from the seller, to bind both by a memorandum of the contract, as prescribed in the Title on *Sale*.

N. Y. C. C., Sec. 1265.

NOTE.—See Sec. 1798.

## ARTICLE II.

### FACTORS.

SECTION 2367. Factor, what.

2368. Actual authority of factor.

2369. Ostensible authority.

Factor, what.

SEC. 2367. A factor is an agent, as defined by Sec. 2026:

N. Y. C. C., Sec. 1266.

Actual  
authority  
of factor.

SEC. 2368. In addition to the authority of agents in general, a factor has actual authority from his principal, unless specially restricted—

1. To insure property consigned to him uninsured.

2. To sell, on credit, anything intrusted to him for sale, except such things as it is contrary to usage to sell on credit; but not to pledge, mortgage or barter the same; and,

3. To delegate his authority to his partner or servant, but not to any person in an independent employment.

N. Y. C. C., Sec. 1267.

Ostensible  
authority.

SEC. 2369. A factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership.

N. Y. C. C., Sec. 1268.

## ARTICLE III.

## SHIPMASTERS AND PILOTS.

SECTION 2373. Authority of shipmaster on behalf of shipowner.

2374. Authority to borrow.

2375. Authority on behalf of owners of cargo.

2376. Power to make contracts.

2377. Power to hypothecate.

2378. Master's power to sell ship.

2379. Master's power to sell cargo.

2380. Authority to ransom ship.

2381. Abandonment terminates master's power.

2382. Personal liability for contracts concerning the ship.

2383. Liability for acts of persons employed upon the ship.

2384. Responsibility for negligence of pilot.

SEC. 2373. The master of a ship is a general agent for its owner, in all matters concerning the same.

Authority of  
shipmaster  
on behalf of  
shipowner.

N. Y. C. C., Sec. 1269.

SEC. 2374. The master of a ship has authority to borrow money on the credit of its owner, if it is necessary to enable him to complete the voyage, and if neither the owner nor his proper agent for such matters can be consulted without injurious delay.

Authority  
to borrow.

N. Y. C. C., Sec. 1270.

SEC. 2375. The master of a ship, during a voyage, is a general agent for each of the owners of the cargo, and has authority to do whatever they might do for the preservation of their respective interests, except to sell or hypothecate the same.

Authority  
on behalf  
of owners  
of cargo.

N. Y. C. C., Sec. 1271.

SEC. 2376. The master of a ship may procure all its necessary repairs and supplies, may engage cargo and passengers for carriage, and, in a foreign port, may enter into a charter party; and his contracts for these purposes bind the owner to the full amount of the value of the ship and freightage.

Power to  
make con-  
tracts.

N. Y. C. C., Sec. 1272.

SEC. 2377. The master of a ship may hypothecate the ship, freightage and cargo, in the cases prescribed by the chapters on *Bottomry* and *Respondentia*, and in no others.

Power to  
hypothecate.

There seems to be no precedent or usage which would justify any other form of hypothecation by a master.

N. Y. C. C., Sec. 1273.

Master's  
power to sell  
ship.

SEC. 2378. When a ship, whether foreign or domestic, is seriously injured, or the voyage is otherwise broken up, beyond the possibility of pursuing it, the master, in case of necessity, may sell the ship without instructions from the owners, unless by the earliest use of ordinary means of communication he can inform the owners, and await their instructions.

N. Y. C. C., Sec. 1274.

Master's  
power to sell  
cargo.

SEC. 2379. The master of a ship may sell the cargo, if the voyage is broken up beyond the possibility of pursuing it, and no other ship can be obtained to carry it to its destination, and the sale is otherwise absolutely necessary.

N. Y. C. C., Sec. 1275.

Authority to  
ransom ship.

SEC. 2380. The master of a ship, in case of its capture, may engage to pay a ransom for it, in money or in part of the cargo, and his engagement will bind the ship, freightage and cargo.

N. Y. C. C., Sec. 1276.

Abandon-  
ment termi-  
nates mas-  
ter's power.

SEC. 2381. The power of the master of a ship to bind its owner, or the owners of the cargo, ceases upon the abandonment of the ship and freightage to insurers.

N. Y. C. C., Sec. 1277.

Personal lia-  
bility for  
contracts  
concerning  
the ship.

SEC. 2382. Unless otherwise expressly agreed, or unless the contracting parties give exclusive credit to the owner, the master of a ship is personally liable upon his contracts relative thereto, even when the owner is also liable.

N. Y. C. C., Sec. 1278.

Liability for  
acts of per-  
sons em-  
ployed upon  
the ship.

SEC. 2383. The master of a ship is liable to third persons for the acts or negligence of persons employed in its navigation, whether appointed by him or not, to the same extent as the owner of the ship.

N. Y. C. C., Sec. 1279.

Responsibil-  
ity for negli-  
gence of  
pilot.

SEC. 2384. The owner or master of a ship is not responsible for the negligence of a pilot whom he is bound by law to employ; but if he is allowed an option between pilots, some of whom are competent, or is required only to pay compensation to a pilot, whether he employs him or not, he is so responsible to third persons.

N. Y. C. C., Sec. 1280.

## ARTICLE IV.

## SHIPS' MANAGERS.

SECTION 2388. What powers manager has.

2389. What powers he has not.

SEC. 2388. A ship's manager has power to make contracts requisite for the performance of his duties as such; to enter into charter parties, or make contracts for carriage; and to settle for freightage and adjust averages.

What powers manager has.

N. Y. C. C., Sec. 1281.

SEC. 2389. Without special authority, a ship's manager cannot borrow money, or give up the lien for freightage, or purchase a cargo, or bind the owners of the ship to an insurance.

What powers he has not.

N. Y. C. C., Sec. 1282.

## TITLE X.

## PARTNERSHIP.

## CHAPTER I. PARTNERSHIP IN GENERAL.

## II. GENERAL PARTNERSHIP.

## III. SPECIAL PARTNERSHIP.

## IV. MINING PARTNERSHIP.

## CHAPTER I.

## PARTNERSHIP IN GENERAL.

## ARTICLE I. WHAT CONSTITUTES A PARTNERSHIP.

## II. PARTNERSHIP PROPERTY.

## III. MUTUAL OBLIGATIONS OF PARTNERS.

## IV. RENUNCIATION OF PARTNERSHIP.

## ARTICLE I.

## WHAT CONSTITUTES A PARTNERSHIP.

SECTION 2395. Partnership, what.

2396. Ship owners.

2397. Formation of partnership.

Partnership,  
what.

**SEC. 2395.** Partnership is the association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them.

N. Y. C. C., Sec. 1283.

Ship owners.

**SEC. 2396.** Part owners of a ship do not, by simply using it in a joint enterprise, become partners as to the ship.

N. Y. C. C., Sec. 1284.

Formation  
of partner-  
ship.

**SEC. 2397.** A partnership can be formed only by the consent of all the parties thereto, and therefore no new partner can be admitted into a partnership without the consent of every existing member thereof.

N. Y. C. C., Sec. 1285.

## ARTICLE II.

### PARTNERSHIP PROPERTY.

**SECTION 2401.** Partnership property, what.

2402. Partners' interest in partnership property.

2403. Partners share in profits and losses.

2404. When division of losses implied.

2405. Partner may require application of partnership property to payment of debts.

2406. What property is partnership property by presumption.

Partnership  
property,  
what.

**SEC. 2401.** The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership, and all that is subsequently acquired thereby.

Code Napoleon, Art. 1839; N. Y. C. C., Sec. 1286; accords with Duprey vs. Leavenworth (17 Cal., 362) and Collumb vs. Read (24 N. Y., 505).

Partners in-  
terest in  
partnership  
property.

**SEC. 2402.** The interest of each member of a partnership extends to every portion of its property.

N. Y. C. C., Sec. 1287; Blacks. Com., 182; Mabbett vs. White, 12 N. Y., 442; Story on Partn., Sec. 16.

Partners  
share in  
profits and  
losses.

**SEC. 2403.** In the absence of any agreement on the subject, the shares of partners in the profit or loss of the business are equal, and the share of each in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss.

N. Y. C. C., Sec. 1288.

**Sec. 2404.** An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated.

When division of losses implied

N. Y. C. C., Sec. 1289.

**NOTE.**—This settles what has been heretofore a doubtful proposition.

**Sec. 2405.** Each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the shares of the other partners for this purpose, and for the payment of the general balance, if any due to him.

Partner may require application of partnership property to payment of debts.

Chase vs. Steel, 9 Cal., 64; Burpee vs. Bunn, 22 Cal., 194; Bullock vs. Hubbard, 23 Cal., 501; Duryea vs. Burt, 28 Cal., 569; N. Y. C. C., Sec. 1290.

**Sec. 2406.** Property, whether real or personal, acquired with partnership funds, is presumed to be partnership property.

What property is partnership property by presumption

N. Y. C. C., Sec. 1291; Collumb vs. Read, 20 N. Y., 505; Duprey vs. Leavenworth, 17 Cal., 262.

### ARTICLE III.

#### MUTUAL OBLIGATIONS OF PARTNERS.

**SECTION 2410.** Partners trustees for each other.

2411. Good faith to be observed between them.

2412. Mutual liability of partners to account.

2413. No compensation for services to firm.

**Sec. 2410.** The relations of partners are confidential. They are trustees for each other within the meaning of Chap. I of the Title on *Trusts*, and their obligations as such trustees are defined by that chapter.

Partners trustees for each other.

N. Y. C. C., Sec. 1292.

**Sec. 2411.** In all proceedings connected with the formation, conduct, dissolution and liquidation of a partnership, every partner is bound to act in the highest good faith towards his copartners. He may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.

Good faith to be observed between them.

N. Y. C. C., Sec. 1293.

Mutual  
liability of  
partners to  
account.

SEC. 2412. Each member of a partnership must account to it for everything that he receives on account thereof, and is entitled to reimbursement therefrom for everything that he properly expends for the benefit thereof, and to be indemnified thereby for all losses and risks which he necessarily incurs on its behalf.

N. Y. C. C., Sec. 1294.

No compen-  
sation for  
services to  
firm.

SEC. 2413. A partner is not entitled to any compensation for services rendered by him to the partnership.

N. Y. C. C., Sec. 1295.

NOTE.—An agreement may be made for compensation to be paid a member of the partnership for his services, but without such special agreement he is not entitled to compensation, hence the general rule is as stated in the text.

#### ARTICLE IV.

##### RENUNCIATION OF PARTNERSHIP.

SECTION 2417. Renunciation of future profits exonerates from liability.

2418. Effect of renunciation.

Renuncia-  
tion of future  
profits exon-  
erates from  
liability.

SEC. 2417. A partner may exonerate himself from all future liability to a third person, on account of the partnership, by renouncing, in good faith, all participation in its future profits, and giving notice to such third person, and to his own copartners, that he has made such renunciation; and that, so far as may be in his power, he dissolves the partnership and does not intend to be liable on account thereof for the future.

N. Y. C. C., Sec. 1296.

Effect of re-  
nunciation.

SEC. 2418. After a partner has given notice of his renunciation of the partnership he cannot claim any of its subsequent profits, and his copartners may proceed to dissolve the partnership.

N. Y. C. C., Sec. 1297.



## CHAPTER II.

## GENERAL PARTNERSHIP.

## ARTICLE I. WHAT IS A GENERAL PARTNERSHIP.

## II. POWERS AND AUTHORITY OF PARTNERS.

## III. MUTUAL OBLIGATIONS OF PARTNERS.

## IV. LIABILITY OF PARTNERS.

## V. TERMINATION OF PARTNERSHIP.

## VI. LIQUIDATION.

## VII. OF THE USE OF FICTITIOUS NAMES.

## ARTICLE I.

## WHAT IS A GENERAL PARTNERSHIP.

## SECTION 2424. General partnership, what.

SEC. 2424. Every partnership that is not formed in accordance with the law concerning special or mining partnerships, and every special or mining partnership, so far only as the general partners are concerned, is a general partnership.

General  
partnership,  
what.

N. Y. C. C., Sec. 1298.

## ARTICLE II.

## POWERS AND AUTHORITY OF PARTNERS.

## SECTION 2428. Power of majority of partners.

## 2429. Authority of individual partner.

## 2430. What authority partner has not.

## 2431. Partner's acts in bad faith, when ineffectual.

SEC. 2428. Unless otherwise expressly stipulated, the decision of the majority of the members of a general partnership binds it in the conduct of its business.

Power of  
majority  
partners.

N. Y. C. C., Sec. 1299.

SEC. 2429. Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his copartners by an agreement in writing.

Authority  
individual  
partner.

N. Y. C. C., Sec. 1300.

NOTE.—The authorities cited under this section of the New York Civil Code are ample in support of this rule.

What authority partner has not.

SEC. 2430. A partner, as such, has not authority to do any of the following acts, unless his copartners have wholly abandoned the business to him, or are incapable of acting:

1. To make an assignment of the partnership property, or any portion thereof, to a creditor, or to a third person, in trust for the benefit of a creditor or of all creditors.

2. To dispose of the good will of the business.

3. To dispose of the whole of the partnership property at once, unless it consists entirely of merchandise.

4. To do any act which would make it impossible to carry on the ordinary business of the partnership; or,

5. To do any other act not within the scope of the preceding section.

N. Y. C. C., Sec. 1301.

NOTE.—See note to Sec. 1301 (N. Y. C. C.) for authorities.

Partner's acts in bad faith, when ineffectual.

SEC. 2431. A partner is not bound by any act of a copartner, in bad faith toward him, though within the scope of the partner's powers, except in favor of persons who have in good faith parted with value in reliance upon such act.

N. Y. C. C., Sec. 1302.

NOTE.—If a choice must be made which of two parties must suffer by the bad faith of a person, that one who, by association with, indorses him, ought to suffer.

### ARTICLE III.

#### MUTUAL OBLIGATIONS OF PARTNERS.

SECTION 2435. Profits of individual partner.

2436. In what business partner may not engage.

2437. In what he may engage.

2438. Must account to firm for profits.

Profits of individual partner.

SEC. 2435. All profits made by a general partner, in the course of any business usually carried on by the partnership, belong to the firm.

N. Y. C. C., Sec. 1303.

In what business partner may not engage.

SEC. 2436 A general partner who agrees to give his personal attention to the business of the partnership, may not engage in any business which gives him an in-

terest adverse to that of the partnership, or which prevents him from giving to such business all the attention which would be advantageous to it.

N. Y. C. C., Sec. 1304.

Sec. 2437. A partner may engage in any separate business, except as otherwise provided by the last two sections.

In what he may engage.

N. Y. C. C., Sec. 1305.

Sec. 2438. A general partner transacting business contrary to the provisions of this article may be required by any copartner to account to the partnership for the profits of such business.

Must account to firm for profits.

N. Y. C. C., Sec. 1306.

#### ARTICLE IV.

##### LIABILITY OF PARTNERS.

Section 2442. Liability of partners to third persons.

2443. Liability for each other's acts as agents.

2444. Liability of one held out as partner.

2445. No one liable as partner unless held out as such.

Sec. 2442. Every general partner is liable to third persons for all the obligations of the partnership, jointly with his copartners.

Liability of partners to third persons

N. Y. C. C., Sec. 1307.

Sec. 2443. The liability of general partners for each other's acts is defined by the Title on *Agency*.

Liability for each other's acts as agents.

N. Y. C. C., Sec. 1308.

Sec. 2444. Any one permitting himself to be represented as a partner, general or special, is liable, as such, to third persons to whom such representation is communicated, and who, on the faith thereof, give credit to the partnership.

Liability of one held out as partner.

N. Y. C. C., Sec. 1309.

Sec. 2445. No one is liable as a partner who is not such in fact, except as provided in the last section.

No one liable as partner unless held out as such.

N. Y. C. C., Sec. 1310.

NOTE.—See note to this section in the New York Civil Code.

## ARTICLE V.

## TERMINATION OF PARTNERSHIP.

## SECTION 2449. Duration of partnership.

2450. Total dissolution of partnership.

2451. Partial dissolution.

2452. Partner entitled to dissolution.

2453. Notice of termination.

2454. Notice by change of name.

Duration of  
partnership.

SEC. 2149. If no term is prescribed by agreement for its duration, a general partnership continues until dissolved by a partner or by operation of law.

N. Y. C. C., Sec. 1311.

Total disso-  
lution of  
partnership.

SEC. 2450. A general partnership is dissolved, as to all the partners—

1. By lapse of the time prescribed by agreement for its duration.

2. By the expressed will of any partner, if there is no such agreement.

3. By the death of a partner.

4. By the transfer to a person, not a partner, of the interest of any partner in the partnership property.

5. By war, or the prohibition of commercial intercourse between the country in which one partner resides, and that in which another resides; or,

6. By a judgment of dissolution.

N. Y. C. C., Sec. 1312.

Partial  
dissolution.

SEC. 2451. A general partnership may be dissolved, as to himself only, by the expressed will of any partner, notwithstanding his agreement for its continuance, subject however to liability to his copartners for any damage caused to them thereby, unless the circumstances are such as entitle him to a judgment of dissolution.

N. Y. C. C., Sec. 1313.

Partner  
entitled to  
dissolution.

SEC. 2452. A general partner is entitled to a judgment of dissolution—

1. When he, or another partner, becomes legally incapable of contracting.

2. When another partner fails to perform his duties under the agreement of partnership, or is guilty of serious misconduct; or,

3. When the business of the partnership can be carried on only at a permanent loss.

N. Y. C. C., Sec. 1314.

SEC. 2453. The liability of a general partner for the acts of his copartners continues, even after a dissolution of the partnership, in favor of persons who have had dealings with, and given credit to the partnership during its existence, until they have had personal notice of the dissolution; and in favor of other persons until such dissolution has been advertised in a newspaper published in every county where the partnership, at the time of its dissolution, had a place of business, if a newspaper is there published, to the extent in either case to which such persons part with value in good faith, and in the belief that such partner is still a member of the firm.

Notice of  
termination.

N. Y. C. C., Sec. 1315.

SEC. 2454. A change of the partnership name, which plainly indicates the withdrawal of a partner, is sufficient notice of the fact of such withdrawal to all persons to whom it is communicated; but a change in the name, which does not contain such an indication, is not notice of the withdrawal of any partner.

Notice by  
change of  
name.

N. Y. C. C., Sec. 1316.

## ARTICLE VI.

### LIQUIDATION.

SECTION 2458. Powers of partners after dissolution.

2459. Who may act in liquidation.

2460. Who may not act in liquidation.

2461. Powers of partners in liquidation.

2462. What partner may do in liquidation.

SEC. 2458. After the dissolution of a partnership, the powers and authority of the partners are such only as are prescribed by this article.

Powers of  
partners  
after disso-  
lution.

N. Y. C. C., Sec. 1317.

SEC. 2459. Any member of a general partnership may act in liquidation of its affairs, except as provided by the next section.

Who may  
act in liqui-  
dation.

N. Y. C. C., Sec. 1318.

Who may  
not act in  
liquidation.

**SEC. 2460.** If the liquidation of a partnership is committed, by consent of all the partners, to one or more of them, the others have no right to act therein; but their acts are valid in favor of persons parting with value, in good faith, upon credit thereof.

N. Y. C. C., Sec. 1319.

Powers of  
partners in  
liquidation.

**SEC. 2461.** A partner authorized to act in liquidation may collect, compromise or release any debts due to the partnership, pay or compromise any claims against it, and dispose of the partnership property.

N. Y. C. C., Sec. 1320.

What part-  
ner may do  
in liquida-  
tion.

**SEC. 2462.** A partner authorized to act in liquidation may enter, in the name of the firm, into any obligation, by way of satisfaction of a partnership debt, or as a collateral security therefor; but he cannot make, draw or indorse any other obligation in its name, nor revive a debt against the firm, by any acknowledgment or part payment, within the provisions of the CODE OF CIVIL PROCEDURE concerning the times of commencing civil actions.

N. Y. C. C., Sec. 1321.

## ARTICLE VII.

### OF THE USE OF FICTITIOUS NAMES.

#### SECTION 2466. Fictitious name.

2467. Style of foreign partnership.

2468. Continuation of style of firm having foreign business relations.

2469. Certificates stating names, etc., what to contain, and to be filed and published.

2470. Register of such firms to be kept by County Clerk.

2471. Certified copies of register, and proof of publication, to be evidence.

Fictitious  
name.

**SEC. 2466.** No partnership or person may transact business by a fictitious name, or in the name of a person not interested in such business, except as prescribed in this article.

N. Y. C. C., Sec. 1322.

Style of  
foreign  
partnership.

**SEC. 2467.** A commercial partnership, established and transacting business in a place without the United States,

may use in this State the partnership name used by it there, although fictitious.

N. Y. C. C., Sec. 1323.

**Sec. 2468.** The name of a partnership, which has had business relations with places without the United States, may be continued in use by the persons succeeding to its business, and by their successors, upon compliance with the provisions of this article, and with the consent of the persons, if living, whose names are used.

Continuation of style of firm having foreign business relations.

N. Y. C. C., Sec. 1324.

**Sec. 2469.** On every change of the persons continuing the use of a partnership name, under the last section, the person acquiring the right to use it must sign and acknowledge before a proper officer for that purpose, a certificate, stating the name of each person dealing under such name, and his place of residence, and must file the same with the Clerk of the county in which their principal place of business is situated, and must publish such certificate, or a statement containing the substance thereof, once in each week for four successive weeks, beginning within one week after his first using such name, in a newspaper printed in the county, or nearest the county (if none is printed in the county), in which such principal place of business is situated.

Certificates, stating names, etc., what to contain, and to be filed and published.

N. Y. C. C., Sec. 1325.

**Sec. 2470.** Every County Clerk must keep a register of the names of firms and persons mentioned in the certificates filed with him, pursuant to the last section, entering in alphabetical order the name of every such partnership and of each partner therein.

Register of such firms to be kept by County Clerk.

N. Y. C. C., Sec. 1326.

**Sec. 2471.** Copies of the entries of a County Clerk, as herein directed, when certified by him, and affidavits of publication, as herein directed, made by the printer, publisher or chief clerk of a newspaper, are presumptive evidence of the facts therein stated.

Certified copies of register and proof of publication to be evidence.

N. Y. C. C., Sec. 1327.

## CHAPTER III.

## SPECIAL PARTNERSHIP.

## ARTICLE I. FORMATION OF PARTNERSHIP. -

## II. POWERS, RIGHTS AND DUTIES OF THE PARTNERS.

## III. LIABILITY OF PARTNERS.

## IV. ALTERATION AND DISSOLUTION OF THE PARTNERSHIP.

## ARTICLE I.

## FORMATION OF PARTNERSHIP.

## SECTION 2477. Formation of special partnership.

2478. Of what to consist.

2479. Certified statement.

2480. Acknowledged and recorded. False statement.

2481. Affidavit as to sums contributed.

2482. No partnership until compliance.

2483. Certificate to be published.

2484. Affidavit of publication filed.

2485. Renewal of special partnership.

Formation  
of special  
partnership.

SEC. 2477. A special partnership may be formed by two or more persons, in the manner and with the effect prescribed in this chapter, for the transaction of any business except banking or insurance.

Stats. 1870, 123, Sec. 1.

Of what to  
consist.

SEC. 2478. A special partnership may consist of one or more persons called general partners, and one or more persons called special partners.

Stats. 1870, 123, Sec. 2.

Certified  
statement.

SEC. 2479. Persons desirous of forming a special partnership must severally sign a certificate, stating—

1. The name under which the partnership is to be conducted.

2. The general nature of the business intended to be transacted.

3. The names of all the partners, and their residences, specifying which are general and which are special partners.

4. The amount of capital which each special partner has contributed to the common stock.



5. The periods at which such partnership will begin and end.

Stats. 1870, 123, Sec. 3.

SEC. 2480. Certificates under the last section must be acknowledged by all the partners, before some officer authorized to take acknowledgment of deeds, one to be filed in the Clerk's office and the other recorded in the office of the Recorder of the county in which the principal place of business of the partnership is situated, in a book to be kept for that purpose, open to public inspection; and if the partnership has places of business situated in different counties, a copy of the certificate, certified by the Recorder in whose office it is recorded, must be filed in the Clerk's office, and recorded, in like manner, in the office of the Recorder in every such county. If any false statement is made in any such certificate, all the persons interested in the partnership are liable, as general partners, for all the engagements thereof.

Acknowledged and recorded.

False statement.

Stats. 1870, 123, Sec. 4.

SEC. 2481. An affidavit of each of the partners, stating that the sums specified in the certificate of the partnership, as having been contributed by each of the special partners, have been actually and in good faith paid, in the lawful money of the United States, must be filed in the same office with the original certificate.

Affidavit as to sums contributed.

Stats. 1870, 123, Sec. 5.

SEC. 2482. No special partnership is formed until the provisions of the last five sections are complied with.

No partnership until compliance.

Stats. 1870, 123, Sec. 6.

SEC. 2483. The certificate mentioned in this article, or a statement of its substance, must be published in a newspaper printed in the county where the original certificate is filed, and if no newspaper is there printed, then in a newspaper in the State, nearest thereto. Such publication must be made once a week for four successive weeks, beginning within one week from the time of filing the certificate. In case such publication is not so made, the partnership must be deemed general.

Certificate to be published

Stats. 1870, 123, Sec. 7.

SEC. 2484. An affidavit of the making of the publication mentioned in the preceding section, made by the

Affidavit of publication filed.

printer, publisher, or chief clerk of the newspaper in which such publication is made, may be filed with the County Recorder with whom the original certificate was filed, and is presumptive evidence of the facts therein stated.

Stats. 1870, 124, Sec. 8.

Renewal of  
special  
partnership.

SEC. 2485. Every renewal or continuance of a special partnership must be certified, recorded, verified and published in the same manner as upon its original formation.

Stats. 1870, 124, Sec. 9.

## ARTICLE II.

### POWERS, RIGHTS AND DUTIES OF THE PARTNERS.

SECTION 2489. Who to do business.

2490. Special partners may advise.

2491. May loan money. Insolvency.

2492. General partners may sue and be sued.

2493. Withdrawal of capital.

2494. Interest and profits.

2495. Result of withdrawing capital.

2496. Preferential transfer void.

Who to do  
business.

SEC. 2489. The general partners only have authority to transact the business of a special partnership.

Stats. 1870, 124, Sec. 10.

Special part-  
ners may  
advise.

SEC. 2490. A special partner may at all times investigate the partnership affairs, and advise his partners, or their agents, as to their management.

Stats. 1870, 124, Sec. 11.

May loan  
money.

SEC. 2491. A special partner may lend money to the partnership, or advance money for it, and take from it security therefor, and as to such loans or advances has the same rights as any other creditor; but, in case of the insolvency of the partnership, all other claims which he may have against it must be postponed until all other creditors are satisfied.

Stats. 1870, 124, Sec. 12.

General  
partners  
may sue and  
be sued.

SEC. 2492. In all matters relating to a special partnership, its general partners may sue and be sued alone, in the same manner as if there were no special partners.

Stats. 1870, 124, Sec. 13.

**SEC. 2493.** No special partner, under any pretence, may withdraw any part of the capital invested by him in the partnership, during its continuance.

Withdrawal  
of capital.

Stats. 1870, 124, Sec. 14.

**SEC. 2494.** A special partner may receive such lawful interest and such proportion of profits as may be agreed upon, if not paid out of the capital invested in the partnership by him, or by some other special partner, and is not bound to refund the same to meet subsequent losses.

Interest and  
profits.

Stats. 1870, 124, Sec. 15.

**SEC. 2495.** If a special partner withdraws capital from the firm, contrary to the provisions of this article, he thereby becomes a general partner.

Result of  
withdrawing  
capital.

Stats. 1870, 124, Sec. 16.

**SEC. 2496.** Every transfer of the property of a special partnership, or of a partner therein, made after, or in contemplation of, the insolvency of such partnership or partner, with intent to give a preference to any creditor of such partnership or partner over any other creditor of such partnership, is void against the creditors thereof; and every judgment confessed, lien created or security given, in like manner and with the like intent, is in like manner void.

Preferential  
transfer void

Stats. 1870, 124, Sec. 17.

### ARTICLE III.

#### LIABILITY OF PARTNERS.

**SECTION 2500.** Liability of partners.

2501. Of special partners.

2502. Liability for unintentional act.

2503. Who may question existence of special partnership.

**SEC. 2500.** The general partners in a special partnership are liable to the same extent as partners in a general partnership.

Liability of  
partners.

Stats. 1870, 124, Sec. 18.

**SEC. 2501.** The contribution of a special partner to the capital of the firm, and the increase thereof, is liable for its debts, but he is not otherwise liable therefor, except as follows :

Of special  
partners.

1. If he has wilfully made or permitted a false or materially defective statement in the certificate of the partnership, the affidavit filed therewith, or the published announcement thereof, he is liable, as a general partner, to all creditors of the firm.

2. If he has wilfully interfered with the business of the firm, except as permitted in Art. II of this chapter, he is liable in like manner; or,

3. If he has wilfully joined in, or assented to, an act contrary to any of the provisions of Art. II. of this chapter, he is liable in like manner.

Stats. 1870, 124, Sec. 19.

Liability for unintentional act.

SEC. 2502. When a special partner has unintentionally done any of the acts mentioned in the last section he is liable, as a general partner, to any creditor of the firm who has been actually misled thereby to his prejudice.

Stats. 1870, 125, Sec. 20.

Who may question existence of special partnership.

SEC. 2503. One who, upon making a contract with a partnership, accepts from or gives to it a written memorandum of the contract, stating that the partnership is special, and giving the names of the special partners, cannot afterwards charge the persons thus named as general partners upon that contract, by reason of an error or defect in the proceedings for the creation of the special partnership, prior to the acceptance of the memorandum, if an effort has been made by the partners, in good faith, to form a special partnership in the manner required by Art. I of this chapter.

Stats. 1870, 125, Sec. 21.

#### ARTICLE IV.

##### ALTERATION AND DISSOLUTION.

SECTION 2507. When special partnership becomes general.

2508. How new special partners may be admitted.

2509. Dissolution of special partnerships. Notice.

2510. The name of a special partner not used, unless.

When special partnership becomes general.

SEC. 2507. A special partnership becomes general if, within ten days after any partner withdraws from it, or any new partner is received into it, or a change is made in the nature of its business or in its name, a certificate

of such fact, duly verified and signed by one or more of the partners, is not filed with the County Clerk and Recorder with whom the original certificate of the partnership was filed, and notice thereof published as is provided in Art. I of this chapter for the publication of the certificate.

Stats. 1870, 125, Sec. 22.

SEC. 2508. New special partners may be admitted into a special partnership upon a certificate, stating the names, residences and contributions to the common stock of each of such partners, signed by each of them, and by the general partners, verified, acknowledged or proved, according to the provisions of Art. I of this chapter, and filed with the County Clerk and Recorder with whom the original certificate of the partnership was filed.

How new special partners may be admitted.

Stats. 1870, 125, Sec. 23.

SEC. 2509. A special partnership is subject to dissolution in the same manner as a general partnership, except that no dissolution, by the act of the partners, is complete until a notice thereof has been filed and recorded in the office of the County Clerk and Recorder with whom the original certificate was recorded, and published once in each week, for four successive weeks, in a newspaper printed in each county where the partnership has a place of business.

Dissolution of special partnerships

Notice.

Stats. 1870, 125, Sec. 24.

SEC. 2510. The name of a special partner must not be used in the firm name of partnership, unless it be accompanied with the word "Limited."

The name of a special partner not used, unless.

Stats. 1870, 125, Sec. 25.

NOTE.—This entire chapter was adopted in 1870, by our Legislature, from the New York Civil Code, vol. 2, Tit. X, pages 381 to 404, and has only been changed in language and divided into articles.

## CHAPTER IV.

### MINING PARTNERSHIPS.

SECTION 2516. Special mining partnerships formed as other special partnerships. Additional statement in certificate.

SECTION 2517. Meeting to levy assessments, how called and how proved to be valid.

2518. How notices shall be served and proof thereof made.

2519. Assessment, what and how levied. When to be paid, and shares, how forfeited and to whom.

2520. How, on what notice, and by whom sales to be made. Deal made and what it is proof of.

2521. Assessments not to exceed certain amount. Additional assessment, when and how levied.

Special mining partnerships formed as or her special partnerships.

Additional statement in certificate..

SEC. 2516. All special partnerships, formed for the purpose of mining within this State, must comply with all the provisions of Art. I, Chap. II, of this Title, in the formation of such copartnerships; when so formed such special partnerships have all the powers and rights conferred, and are subject to all the duties and liabilities imposed by this Title. The certificate must, in addition to the requirements of Art. I, Chap. III, of this Title, contain the name and location of the mine or mines proposed to be worked or prospected.

[New section.]

Meeting to levy assessments, how called and how proved to be valid.

SEC. 2517. Any member of a mining partnership may notify the other members thereof of his purpose to have levied against all the owners, an assessment where-with to prospect, develop or work their mine, designating in the notice a time and a place, within the county where the mine is situate, for a meeting to be held therefor. Five days previous to the day on which the meeting is to be held, the notice must be served on each partner residing in this State, and on the agent (if any residing in this State) of any partner residing out of the State. Proof of service upon all such partners, whether a majority are present or not, makes the proceedings in levying an assessment had at the meeting of which notice is so given, valid and binding on all the members, and on their shares of the mine.

Stats. 1866, 828, Sec. 2.

How notices shall be served and proof thereof made.

SEC. 2518. All notices to members, required under this chapter, must be served as follows :

1. If the party to be served resides in the county where the mine is located, it must be delivered to him personally or left at his place of residence.

2. If the party resides out of the county and within the State, the notice must be sealed in an envelop, addressed

to him at his known or last place of residence, pre-paid and mailed or expressed; service is complete three days after depositing it in the Post-office or express.

3. If the party is out of the State, the notice must be published for eight successive weeks in that newspaper published nearest the mine of the partnership; service is complete on the eighth issue of the paper containing the notice. Proof of service must be made by affidavit to the truth of the return, specifying the acts constituting service by the person serving, mailing or publishing it, attached to a copy of the notice, and filed with the member calling the meeting, or the Secretary of the partnership.

Stats. 1866, 829, Sec. 4.

SEC. 2519. At such meeting a majority of the shares present may levy an assessment upon all the owners, proportional to their respective shares or interests in the mine, and fix the time—not less than thirty days—within which the assessment must be paid, either in money or labor; and if not paid within the time specified, the delinquents must be notified of the amount for which they are delinquent, in the same manner as provided in the preceding section. If the member delinquent fails to discharge the assessment, if in money, or commence work, if it is a labor assessment, for ten days after the service of notice is completed, his shares or interest in the mine becomes the property of the partners who are not delinquent, and may be in whole or in part sold to pay the delinquent assessments, with costs of sale.

Stats. 1866, 828-9, Secs. 2, 3, 5.

Assessment,  
what and  
how levied.

When to be  
paid, and  
shares, how  
forfeited and  
to whom.

SEC. 2520. The sales mentioned in the preceding section must be by a Sheriff, Constable, or an auctioneer, at the mining claim, after ten days' previous notice, given by posting notices containing the amount of the delinquent assessment, the shares or interest, and the name of the owner thereof against which it is levied, and the time and place of sale, in three public places within the district where the mine is located. The sale must be at public auction. The person paying the delinquent assessment thereon for the smallest number of shares or feet of the delinquent interest becomes the purchaser. The purchaser must receive, from the auctioneer or officer selling, a deed to the feet or shares sold, conveying the

How, on  
what notice,  
and by  
whom sales  
to be made.

Deed made  
and what it  
is proof of.

absolute title thereof. The deed is prima facie proof that all proceedings in making the sale are regular. .

Stats. 1866, 829-30, Sec. 6.

Assessments  
not to exceed  
certain  
amount.

Additional  
assessments,  
when and  
how levied.

SEC. 2521. When the by-laws of a mining partnership provide what amount of work must be done in the mine, no assessment must be levied exceeding that which may be necessary to pay for the required work, nor must an additional assessment be levied until all previous assessments have been paid up, or all powers to collect the same exhausted. If by-laws provide a different method for levying assessments than that hereinbefore provided (except as to service of notices), it must be pursued. Assessments may be levied from time to time, as the same may be required, in the manner herein provided; the member calling therefor in no case to be one who, at the time, is delinquent.

Stats. 1866, 828, Sec. 2.

## TITLE XII.

### INSURANCE.

#### CHAPTER I. INSURANCE IN GENERAL.

##### II. MARINE INSURANCE.

##### III. FIRE INSURANCE.

##### IV. LIFE AND HEALTH INSURANCE.

### CHAPTER I.

#### INSURANCE IN GENERAL.

##### ARTICLE I. DEFINITION OF INSURANCE.

##### II. WHAT MAY BE INSURED.

##### III. PARTIES.

##### IV. INSURABLE INTEREST.

##### V. CONCEALMENT AND REPRESENTATION.

##### VI. THE POLICY.

##### VII. WARRANTIES.

##### VIII. PREMIUMS.

##### IX. LOSS.

##### X. NOTICE OF LOSS.

##### XI. DOUBLE INSURANCE.

##### XII. RE-INSURANCE.



## ARTICLE I.

## DEFINITION OF INSURANCE.

## SECTION 2527. Insurance, what.

SEC. 2527. Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability, arising from an unknown or contingent event.

Insurance,  
what.

N. Y. C. C., Sec. 1357.

## ARTICLE II.

## WHAT MAY BE INSURED.

## SECTION 2531. What events may be insured against.

2532. Insurance of lottery or lottery prize unauthorized.

2533. Usual kinds of insurance.

2534. All subject to this chapter.

SEC. 2531. Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this chapter.

What events  
may be  
insured  
against.

N. Y. C. C., Sec. 1358.

SEC. 2532. The preceding section does not authorize an insurance for or against the drawing of any lottery, or for or against any chance or ticket in a lottery drawing a prize.

Insurance of  
lottery or  
lottery prize  
unauthoriz'd

Const., Art. IV, Sec. 27; Stats. 1861, 229, Sec. 8.

## SEC. 2533. The most usual kinds of insurance are :

1. Marine insurance.
2. Fire insurance.
3. Life insurance.
4. Health insurance; and,
5. Accident insurance.

Usual kinds  
of insurance.

N. Y. C. C., Sec. 1359.

SEC. 2534. All kinds of insurance are subject to the provisions of this chapter.

All subject  
to this  
chapter.

N. Y. C. C., Sec. 1360.

## ARTICLE III.

## PARTIES TO THE CONTRACT

## SECTION 2538. Designation of parties.

2539. Who may insure.

2540. Who may be insured.

2541. Assignment to mortgagee of thing insured.

2542. New contract between insurer and assignee.

Designation  
of parties.

SEC. 2538. The person who undertakes to indemnify another, by a contract of insurance, is called the insurer, and the person indemnified is called the insured.

N. Y. C. C., Sec. 1361.

Who may  
insure.

SEC. 2539. Any one capable of making a contract may be an insurer, subject to the restrictions imposed by special statutes upon foreign corporations, non-residents and others.

N. Y. C. C., Sec. 1362.

Who may be  
insured.

SEC. 2540. Any one except a public enemy may be insured.

N. Y. C. C., Sec. 1363.

Assignment  
to mortgagee  
of thing  
insured.

SEC. 2541. Where a mortgagor of property effects insurance in his own name, providing that the loss shall be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, who does not cease to be a party to the original contract, and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee.

N. Y. C. C., Sec. 1364; *Bergen vs. Builders' Insurance Co.*, 28 Cal., 541.New con-  
tract betw'n  
insurer and  
assignee.

SEC. 2542. If an insurer assents to the transfer of an insurance from a mortgagor to a mortgagee, and, at the time of his assent, imposes further obligations on the assignee, making a new contract with him, the acts of the mortgagor cannot affect his rights.

N. Y. C. C., Sec. 1365.

## ARTICLE IV.

## INSURABLE INTEREST

SECTION 2546. Insurable interest, what.

2547. In what may consist.

2548. Interest of carrier or depositary.

2549. Mere expectancies.

2550. Measure of interest in property.

2551. Insurance without interest, illegal.

2552. When interest must exist.

2553. Effect of transfer.

2554. Transfer after loss.

2555. Exception in the case of several subjects in one policy.

2556. In case of the death of the insurer.

2557. In the case of transfer between co-tenants.

SEC. 2546. Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest. Insurable interest, what.

N. Y. C. C., Sec. 1366.

SEC. 2547. An insurable interest in property may consist in— In what may consist.

1. An existing interest.

2. An inchoate interest founded on an existing interest; or,

3. An expectancy, coupled with an existing interest in that out of which the expectancy arises.

N. Y. C. C., Sec. 1367.

SEC. 2548. A carrier or depositary of any kind has an insurable interest in a thing held by him as such, to the extent of its value. Interest of carrier or depositary.

N. Y. C. C., Sec. 1368.

SEC. 2549. A mere contingent or expectant interest in anything, not founded on an actual right to the thing, nor upon any valid contract for it, is not insurable. Mere expectancies.

N. Y. C. C., Sec. 1369.

SEC. 2550. The measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof. Measure of interest in property.

N. Y. C. C., Sec. 1370.

Insurance  
without  
interest,  
illegal.

SEC. 2551. The sole object of insurance is the indemnity of the insured, and if he has no insurable interest the contract is void.

N. Y. C. C., Sec. 1371.

When interest must  
exist.

SEC. 2552. An interest insured must exist when the insurance takes effect, and when the loss occurs, but need not exist in the meantime.

N. Y. C. C., Sec. 1372.

Effect of  
transfer.

SEC. 2553 Except in the cases specified in the next four sections, and in the cases of life, accident and health insurance, a change of interest in any part of a thing insured, unaccompanied by a corresponding change of interest in the insurance, suspends the insurance to an equivalent extent, until the interest in the thing and the interest in the insurance are vested in the same person.

N. Y. C. C., Sec. 1373.

Transfer  
after loss.

SEC. 2554. A change of interest in a thing insured, after the occurrence of an injury which results in a loss, does not affect the right of the insured to indemnity for the loss.

N. Y. C. C., Sec. 1374.

Exception  
in the case  
of several  
subjects in  
one policy.

SEC. 2555. A change of interest in one or more of several distinct things, separately insured by one policy, does not avoid the insurance as to the others.

N. Y. C. C., Sec. 1375.

In case of  
the death of  
the insurer.

SEC. 2556. A change of interest, by will or succession, on the death of the insured, does not avoid an insurance; and his interest in the insurance passes to the person taking his interest in the thing insured.

N. Y. C. C., Sec. 1376.

In the case  
of transfer  
between  
co-tenants.

SEC. 2557. A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance, even though it has been agreed that the insurance shall cease upon an alienation of the thing insured.

N. Y. C. C., Sec. 1377.

## ARTICLE V.

## CONCEALMENT AND REPRESENTATIONS.

## SECTION 2561. Concealment, what.

2562. Effect of concealment.

2563. What must be disclosed.

2564. Matters which need not be communicated without inquiry.

2565. Test of materiality.

2566. Matters which each is bound to know.

2567. Waiver of communication.

2568. Interest of insured.

2569. Fraudulent warranty.

2570. Matters of opinion.

2571. Representation, what.

2572. When made.

2573. How interpreted.

2574. Representation as to future.

2575. How may affect policy.

2576. When may be withdrawn.

2577. Time intended by representation.

2578. Representing information.

2579. Falsity.

2580. Effect of falsity.

2581. Materiality.

2582. Application of provisions of this article.

SEC. 2561. A neglect to communicate that which a party knows, and ought to communicate, is called a concealment.

Concealment  
what.

N. Y. C. C., Sec. 1378.

SEC. 2562. A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance.

Effect of  
concealment

N. Y. C. C., Sec. 1379.

SEC. 2563. Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are, or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty.

What must  
be disclosed.

N. Y. C. C., Sec. 1380.

NOTE.—The New York Code Commissioners say :

“ This appears to be the rule in regard to fire insurance (Gates vs. Madison County Ins. Co., 5 N. Y., 469, 476). Though a fuller disclosure is required in marine insurance (see the chapter thereon), it depends not on a difference of principle, but of the extent of which the insurer may be deemed cognizant of the fact.”

Matters  
which need  
not be com-  
municated  
without  
inquiry.

SEC. 2564. Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other :

1. Those which the other knows.

2. Those which, in the exercise of ordinary care, the other ought to know, and of which the former has no reason to suppose him ignorant.

3. Those of which the other waives communication.

4. Those which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material; and,

5. Those which relate to a risk excepted from the policy, and which are not otherwise material.

N. Y. C. C., Sec. 1381; 2 Duer Ins., 552; 577, Sec. 15; 579, Sec. 16.

Test of  
materiality.

SEC. 2565. Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.

N. Y. C. C., Sec. 1382; 2 Duer Ins., 382-403.

Matters  
which each  
is bound to  
know.

SEC. 2566. Each party to a contract of insurance is bound to know all the general causes which are open to his inquiry, equally with that of the other, and which may affect either the political or material perils contemplated; and all general usages of trade.

N. Y. C. C., Sec. 1383; 2 Duer Ins., 560.

Waiver of  
communica-  
tion.

SEC. 2567. The right to information of material facts may be waived, either by the terms of insurance or by neglect to make inquiries as to such facts, where they are distinctly implied in other facts of which information is communicated.

N. Y. C. C., Sec. 1384.

Interest of  
insured.

SEC. 2568. Information of the nature or amount of the interest of one insured need not be communicated unless in answer to an inquiry, except as prescribed by Sec. 2587.

N. Y. C. C., Sec. 1385.

Fraudulent  
warranty.

SEC. 2569. An intentional and fraudulent omission, on the part of one insured, to communicate information of

matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind.

N. Y. C. C., Sec. 1386 ; 2 Duer Ins., 435, 573.

**SEC. 2570.** Neither party to a contract of insurance is bound to communicate, even upon inquiry, information of his own judgment upon the matters in question. Matters of opinion.

N. Y. C. C., Sec. 1387 ; 2 Duer Ins., 583.

**SEC. 2571.** A representation may be oral or written. Representation, what.

N. Y. C. C., Sec. 1388.

**SEC. 2572.** A representation may be made at the same time with issuing the policy, or before it. When made.

N. Y. C. C., Sec. 1389—modified.

**SEC. 2573.** The language of a representation is to be interpreted by the same rules as the language of contracts in general. How interpreted.

N. Y. C. C., Sec. 1390.

**SEC. 2574.** A representation as to the future is to be deemed a promise, unless it appears that it was merely a statement of belief or expectation. Representation as to future.

N. Y. C. C., Sec. 1391 ; 2 Duer Ins., 664.

**SEC. 2575.** A representation cannot be allowed to qualify an express provision in a contract of insurance; but it may qualify an implied warranty. How may affect policy.

N. Y. C. C., Sec. 1392 ; 2 Duer Ins., 671.

**SEC. 2576.** A representation may be altered or withdrawn before the insurance is effected, but not afterwards. When may be withdrawn.

N. Y. C. C., Sec. 1393 ; 2 Duer Ins., 679.

**SEC. 2577.** The completion of the contract of insurance is the time to which a representation must be presumed to refer. Time intended by representation.

N. Y. C. C., Sec. 1394 ; 2 Duer Ins., 679.

**SEC. 2578.** When a person insured has no personal knowledge of a fact, he may nevertheless repeat information which he has upon the subject, and which he believes to be true, with the explanation that he does so on the information of others, or he may submit the information, Representing information.

in its whole extent, to the insurer; and in neither case is he responsible for its truth, unless it proceeds from an agent of the insured whose duty it is to give the intelligence.

N. Y. C. C., Sec. 1395; 2 Duer Ins., 703-705.

**Falsity.**

SEC. 2579. A representation is to be deemed false when the facts fail to correspond with its assertions or stipulations.

N. Y. C. C., Sec. 1396.

**Effect of falsity.**

SEC. 2580. If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false.

N. Y. C. C., Sec. 1397; 2 Duer Ins., 680, 749-769; 5 id., 587.

**Materiality.**

SEC. 2581. The materiality of a representation is determined by the same rule as the materiality of a concealment.

N. Y. C. C., Sec. 1398.

**Application of provisions of this article**

SEC. 2582. The provisions of this article apply as well to a modification of a contract of insurance as to its original formation.

N. Y. C. C., Sec. 1399.

## ARTICLE VI.

### THE POLICY.

SECTION 2586. Policy, what.

2587. What must be specified in a policy.

2588. Whose interest is covered.

2589. Insurance by agent or trustee.

2590. Insurance by part owner.

2591. General terms.

2592. Successive owners.

2593. Transfer of the thing insured.

2594. Open and valued policies.

2595. Open policy, what.

2596. Valued policy, what.

2597. Running policy, what.

2598. Effect of receipt.

2599. Agreement not to transfer.

**Policy, what.**

SEC. 2586. The written instrument, in which a contract of insurance is set forth, is called a policy of insurance.

N. Y. C. C., Sec. 1400.



**Sec. 2587.** A policy of insurance must specify—

What must  
be specified  
in a policy.

1. The parties between whom the contract is made.
2. The rate of premium.
3. The property or life insured.
4. The interest of the insured in property insured, if he is not the absolute owner thereof.
5. The risks insured against; and,
6. The period during which the insurance is to continue.

Mr. Duer recommends its introduction from the French law into ours, and the Commissioners think the recommendation a good one (see 2 Duer Ins., 463.)

N. Y. C. C., Sec. 1401.

**Sec. 2588.** When the name of the person intended to be insured is specified in a policy, it can be applied only to his own proper interest.

Whose  
interest is  
covered.

N. Y. C. C., Sec. 1402.

**Sec. 2589.** When an insurance is made by an agent or trustee, the fact that his principal or beneficiary is the person really insured may be indicated by describing him as agent or trustee, or by other general words in the policy.

Insurance  
by agent or  
trustee.

N. Y. C. C., Sec. 1403.

**Sec. 2590.** To render an insurance, effected by one partner, or part owner, applicable to the interest of his copartners, or of other part owners, it is necessary that the terms of the policy should be such as are applicable to the joint or common interest.

Insurance by  
part owner.

N. Y. C. C., Sec. 1404; 3 Kent Com., 258.

**Sec. 2591.** When the description of the insured in a policy is so general that it may comprehend any person or any class of persons, he only can claim the benefit of the policy who can show that it was intended to include him.

General  
terms.

N. Y. C. C., Sec. 1405.

**Sec. 2592.** A policy may be so framed that it will inure to the benefit of whomsoever, during the continuance of the risk, may become the owner of the interest insured.

Successive  
owners.

N. Y. C. C., Sec. 1406.

**Sec. 2593.** The mere transfer of a thing insured does not transfer the policy, but suspends it until the same

Transfer of  
the thing  
insured.

person becomes the owner of both the policy and the thing insured.

N. Y. C. C., Sec. 1407.

Open and  
valued  
policies.

SEC. 2594. A policy is either open or valued.

N. Y. C. C., Sec. 1408.

Open policy,  
what.

SEC. 2595. An open policy is one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss.

N. Y. C. C., Sec. 1409; 3 Kent Com., 272.

Valued  
policy, what.

SEC. 2596. A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum.

N. Y. C. C., Sec. 1410.

Running  
policy, what.

SEC. 2597. A running policy is one which contemplates successive insurances, and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or indorsements.

N. Y. C. C., Sec. 1411.

Effect of  
receipt.

SEC. 2598. An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.

N. Y. C. C., Sec. 1412.

Agreement  
not to  
transfer.

SEC. 2599. An agreement made before a loss, not to transfer the claim of a person insured against the insurer, after the loss has happened, is void.

N. Y. C. C., Sec. 1413.

## ARTICLE VII.

### WARRANTIES.

SECTION 2603. Warranty, express or implied.

2604. Form.

2605. Warranty must be in policy.

2606. Past, present and future warranties

2607. Warranty as to past or present.

2608. Warranty as to the future.

2609. Performance excused.

**SECTION 2610.** What acts avoid the policy.

2611. Policy may provide for avoidance.

2612. Breach without fraud.

**SEC. 2603.** A warranty is either express or implied.

N. Y. C. C., Sec. 1414.

Warranty,  
express or  
implied.

**SEC. 2604.** No particular form of words is necessary  
to create a warranty.

N. Y. C. C., Sec. 1415.

Form.

**SEC. 2605.** Every express warranty, made at or before  
the execution of a policy, must be contained in the policy  
itself, and another instrument, whether upon the same  
paper or not, cannot be referred to as making a part of the  
policy for this purpose, even by agreement of the parties.

N. Y. C. C., Sec. 1416.

Warranty  
must be in  
policy.

**SEC. 2606.** A warranty may relate to the past, the  
present, the future, or to any or all of these.

N. Y. C. C., Sec. 1417.

Past, present  
and future  
warranties.

**SEC. 2607.** A statement in a policy, of a matter relat-  
ing to the person or thing insured, or to the risk, as a  
fact, is an express warranty thereof.

N. Y. C. C., Sec. 1418.

Warranty as  
to past or  
present.

**SEC. 2608.** A statement in a policy, which imports  
that it is intended to do or not to do a thing which mate-  
rially affects the risk, is a warranty that such act or  
omission shall take place.

N. Y. C. C., Sec. 1419; 5 Duer Ins., 587.

Warranty  
as to the  
future.

**SEC. 2609.** When, before the time arrives for the per-  
formance of a warranty relating to the future, a loss in-  
sured against happens, or performance becomes unlawful  
or impossible, the omission to fulfil the warranty does not  
avoid the policy.

N. Y. C. C., Sec. 1420.

Performance  
excused.

**SEC. 2610.** The violation of a material warranty, or  
other material provision of a policy, on the part of either  
party thereto, entitles the other to rescind.

N. Y. C. C., Sec. 1421.

What acts  
avoid the  
policy

**SEC. 2611.** A policy may declare that a violation of  
specified provisions thereof shall avoid it; otherwise the

Policy may  
provide for  
avoidance.

breach of an immaterial provision does not avoid the policy.

N. Y. C. C., Sec. 1422.

Breach  
without  
fraud.

SEC. 2612. A breach of warranty, without fraud, merely exonerates an insurer from the time that it occurs; or, where it is broken in its inception, prevents the policy from attaching to the risk.

N. Y. C. C., Sec. 1423; 2 Duer Ins., 435.

## ARTICLE VIII.

### PREMIUM.

SECTION 2616. When premium is earned.

2617. Return of premium.

2618. When none allowed.

2619. Return for fraud.

2620. Over-insurance by several insurers.

2621. Contribution.

2622. Proportionate contribution.

When pre-  
mium is  
earned.

SEC. 2616. An insurer is entitled to payment of the premium, as soon as the thing insured is exposed to the peril insured against.

N. Y. C. C., Sec. 1424.

Return of  
premium.

SEC. 2617. A person insured is entitled to a return of premium paid, or a ratable proportion thereof, if no part of his interest in the thing insured is exposed to any of the perils insured against; or, where the insurance is made for a definite period of time, if it is not exposed to such peril for the whole of that time.

N. Y. C. C., Sec. 1425.

When none  
allowed.

SEC. 2618. If a peril insured against has existed, and the insurer has been liable, for any period, however short, the insured is not entitled to a return of premium, so far as that particular risk is concerned, unless the insurance was for a definite period of time, in which case he is entitled to a proportionate return under the preceding section.

N. Y. C. C., Sec. 1427.

Return for  
fraud.

SEC. 2619. A person insured is entitled to a return of the premium when the contract is voidable, on account of the fraud or misrepresentation of the insurer, or on

**account of facts, of the existence of which the insured was ignorant without his fault; or when, by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy.**

N. Y. C. C., Sec. 1426.

**Sec. 2620.** In case of an over-insurance by several insurers, the insured is entitled to a ratable return of the premium, proportioned to the amount by which the aggregate sum insured in all the policies exceeds the insurable value of the thing at risk.

Over-insurance by several insurers.

N. Y. C. C., Sec. 1428.

**Sec. 2621.** When an over-insurance is effected by simultaneous policies, the insurers contribute to the premium to be returned, in proportion to the amount insured by their respective policies.

Contribution

N. Y. C. C., Sec. 1429.

**Sec. 2622.** When an over-insurance is effected by successive policies, those only contribute to a return of the premium who are exonerated by prior insurances from the liability assumed by them, and in proportion as the sum for which the premium was paid exceeds the amount for which, on account of prior insurance, they could be made liable.

Proportionate contribution.

N. Y. C. C., Sec. 1430.

## ARTICLE IX.

### LOSS.

**SECTION 2626.** Perils, remote and proximate.

2627. Loss incurred in rescue from peril.

2628. Excepted perils.

2629. Negligence and fraud.

**Sec. 2626.** An insurer is liable for a loss of which a peril insured against was the proximate cause; although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.

Perils, remote and proximate.

N. Y. C. C., Sec. 1431.

Loss incurred in rescue from peril.

SEC. 2627. An insurer is liable where the thing insured is rescued from a peril insured against, that would otherwise have caused a loss, if in the course of such rescue the thing is exposed to a peril, not insured against, which permanently deprives the insured of its possession, in whole or in part; or where a loss is caused by efforts to rescue the thing insured from a peril insured against.

N. Y. C. C., Sec. 1432.

Excepted perils.

SEC. 2628. Where a peril is specially excepted in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted.

N. Y. C. C., Sec. 1433; 1 Duer, 371.

Negligence and fraud.

SEC. 2629. An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, nor by fraud or negligence on the part of his agents or others.

N. Y. C. C., Sec. 1434.

## ARTICLE X.

### NOTICE OF LOSS.

#### SECTION 2633. Notice of loss.

2634. Preliminary proofs.

2635. Waivers of defects in notice, etc.

2636. Waiver of delay.

2637. Certificate, when dispensed with.

Notice of loss.

SEC. 2633. In case of loss, an insurer is exonerated, if notice thereof is not given to him by some person insured, or entitled to the benefit of an insurance, without unnecessary delay.

N. Y. C. C., Sec. 1435.

Preliminary proofs.

SEC. 2634. When preliminary proof of loss is required by a policy, the insured is not bound to give such proof as would be necessary in a Court of justice; but it is sufficient for him to give the best evidence which he has in his power at the time.

N. Y. C. C., Sec. 1436.

**SEC. 2635.** All defects in a notice of loss, or in preliminary proof thereof, which the insured might remedy, and which the insurer omits to specify to him, without unnecessary delay, as grounds of objection, are waived.

Waivers of defects in notice, etc.

N. Y. C. C., Sec. 1437.

**SEC. 2636.** Delay in the presentation to an insurer of notice or proof of loss is waived, if caused by any act of his, or if he omits to make objection promptly and specifically upon that ground.

Waiver of delay.

N. Y. C. C., Sec. 1438.

**SEC. 2637.** If a policy requires, by way of preliminary proof of loss, the certificate or testimony of a person other than the insured, it is sufficient for the insured to use reasonable diligence to procure it, and in case of the refusal of such person to give it, then to furnish reasonable evidence to the insurer that such refusal was not induced by any just grounds of disbelief in the facts necessary to be certified.

Certificate, when dispensed with.

N. Y. C. C., Sec. 1439.

## ARTICLE XL

### DOUBLE INSURANCE.

**SECTION 2641.** Double insurance.

**2642.** Contribution in case of double insurance.

**SEC. 2641.** A double insurance exists where the same person is insured by several insurers separately in respect to the same subject and interest.

Double insurance.

N. Y. C. C., Sec. 1440.

**SEC. 2642.** In case of double insurance, the insured may claim payment of a loss from any one of the insurers, who, on paying it, may require the others to contribute ratably thereto.

Contribution in case of double insurance.

N. Y. C. C., Sec. 1441; Ang. Ins., 22; 3 Kent Com., 280.

## ARTICLE XII.

## RE-INSURANCE.

SECTION 2646. Re-insurance, what.

2647. Disclosures required.

2648. Re-insurance presumed to be against liability.

2649. Original insured has no interest.

Re-insur-  
ance, what.

SEC. 2646. A contract of re-insurance is one by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance.

N. Y. C. C., Sec. 1442.

Disclosures  
required.

SEC. 2647. Where an insurer obtains re-insurance, he must communicate all the representations of the original insured, and also all the knowledge and information he possesses, whether previously or subsequently acquired, which is material to the risk.

N. Y. C. C., Sec. 1443 ; 2 Duer Ins., 429.

Re-insur-  
ance pre-  
sumed to be  
against  
liability.

SEC. 2648. A re-insurance is presumed to be a contract of indemnity against liability, and not merely against damage.

N. Y. C. C., Sec. 1444 ; Ang. Ins., 138.

Original  
insured has  
no interest.

SEC. 2649. The original insured has no interest in a contract of re-insurance.

N. Y. C. C., Sec. 1445.

## CHAPTER II.

## MARINE INSURANCE.

NOTE.—We repeat that “rules respecting marine insurance which are but applications of the principles of international law to this subject are not embraced in these provisions, as they are not within the scope of a municipal statute.”

## ARTICLE I. DEFINITION OF MARINE INSURANCE.

## II. INSURABLE INTEREST.

## III. CONCEALMENT.

## IV. REPRESENTATIONS.

## V. IMPLIED WARRANTIES.

## VI. THE VOYAGE, AND DEVIATION.

## VII. LOSS.

## VIII. ABANDONMENT.

## IX. MEASURE OF INDEMNITY



## ARTICLE I.

## DEFINITION OF MARINE INSURANCE.

## SECTION 2655. Marine insurance, what.

Sec. 2655. Marine insurance is an insurance against risks connected with navigation, to which a ship, cargo, freightage, profits, or other insurable interest in movable property, may be exposed during a certain voyage or a fixed period of time.

Marine  
insurance,  
what.

N. Y. C. C., Sec. 1446; 3 Kent Com., 203.

## ARTICLE II.

## INSURABLE INTEREST.

## SECTION 2659. Insurable interest in a ship.

2660. Interest reduced by bottomry.

2661. Freightage, what.

2662. Expected freightage.

2663. Interest in expected freightage, what.

2664. Insurable interest in profits.

2665. Insurable interest of charterer.

Sec. 2659. The owner of a ship has in all cases an insurable interest in it, even when it has been chartered by one who covenants to pay him its value in case of loss.

Insurable  
interest in  
a ship.

N. Y. C. C., Sec. 1447.

Sec. 2660. The insurable interest of the owner of a ship hypothecated by bottomry is only the excess of its value over the amount secured by bottomry.

Interest  
reduced by  
bottomry.

N. Y. C. C., Sec. 1448.

Sec 2661. Freightage, in the sense of a policy of marine insurance, signifies all the benefit derived by the owner, either from the chartering of the ship or its employment for the carriage of his own goods or those of others.

Freightage  
what.

The word "freightage" is used throughout this Code, instead of "freight," to signify the hire of a carrier, for the obvious reason that the latter word properly means the thing carried. The word "freightage" is given in Webster's, Worcester's and Bouvier's Dictionaries, in the sense in which it is here used.

N. Y. C. C., Sec. 1449.

Sec. 2362. The owner of a ship has an insurable interest in expected freightage which he would have certainly

Expected  
freightage.

earned but for the intervention of a peril insured against.

N. Y. C. C., Sec. 1450.

Interest in  
expected  
freightage,  
what.

SEC. 2663. The interest mentioned in the last section exists, in the case of a charter party, when the ship has broken ground on the chartered voyage; and, if a price is to be paid for the carriage of goods, when they are actually on board, or there is some contract for putting them on board, and both ship and goods are ready for the specified voyage.

N. Y. C. C., Sec. 1451.

Insurable  
interest in  
profits.

SEC. 2664. One who has an interest in the thing from which profits are expected to proceed, has an insurable interest in the profits.

N. Y. C. C., Sec. 1452.

Insurable  
interest of  
charterer.

SEC. 2665. The charterer of a ship has an insurable interest in it, to the extent that he is liable to be damaged by its loss.

N. Y. C. C., Sec. 1453.

### ARTICLE III.

#### CONCEALMENT.

SECTION 2669. Information must be communicated.

2670. Material information.

2671. Presumption of knowledge of loss.

2672. Concealments which only affect the risk in question.

Information  
must be com-  
municated.

SEC. 2669. In marine insurance each party is bound to communicate, in addition to what is required by Sec. 2563, all the information which he possesses, material to the risk, except such as is mentioned in Sec. 2564, and to state the exact and whole truth in relation to all matters that he represents, or upon inquiry assumes to disclose.

N. Y. C. C., Sec. 1454; 2 Duer Ins., 381, 388; Ang. Ins., 200.

Material  
information.

SEC. 2670. In marine insurance, information of the belief or expectation of a third person, in reference to a material fact, is material.

N. Y. C. C., Sec. 1455; 2 Duer Ins., 388.

**SEC. 2671.** A person insured by a contract of marine insurance is presumed to have had knowledge, at the time of insuring, of a prior loss, if the information might possibly have reached him in the usual mode of transmission, and at the usual rate of communication.

Presumption of knowledge of loss.

This is the rule which prevails in continental Europe; and its adoption here is recommended by Mr. Duer (2 Duer Ins., 433).

N. Y. C. C., Sec. 1456.

**SEC. 2672.** A concealment in a marine insurance, in respect to any of the following matters, does not vitiate the entire contract, but merely exonerates the insurer from a loss resulting from the risk concealed:

Concealments which only affect the risk in question.

1. The national character of the insured.
2. The liability of the thing insured to capture and detention.
3. The liability to seizure from breach of foreign laws of trade.
4. The want of necessary documents; and,
5. The use of false and simulated papers.

N. Y. C. C., Sec. 1457.

#### ARTICLE IV.

##### REPRESENTATIONS.

**SECTION 2676.** Effect of intentional falsity.

**2677.** Representation of expectation.

**SEC. 2676.** If a representation, by a person insured by a contract of marine insurance, is intentionally false in any respect, whether material or immaterial, the insurer may rescind the entire contract.

Effect of intentional falsity.

N. Y. C. C., Sec. 1458.

**SEC. 2677.** The eventual falsity of a representation as to expectation does not, in the absence of fraud, avoid a contract of insurance.

Representation of expectation.

N. Y. C. C., Sec. 1459.

## ARTICLE V.

## IMPLIED WARRANTIES.

## SECTION 2681. Warranty of seaworthiness.

2682. Seaworthiness, what.

2683. At what time seaworthiness must exist.

2684. What things are required to constitute seaworthiness.

2685. Different degrees of seaworthiness at different stages of the voyage.

2686. Unseaworthiness during the voyage.

2687. Seaworthiness for purposes of insurance on cargo.

2688. Neutral papers.

Warranty of  
seaworthi-  
ness.

SEC. 2681. In every marine insurance upon ship or freightage, or upon anything belonging to the shipowner, unless made for a specified length of time, a warranty is implied that the ship shall be seaworthy.

N. Y. C. C., Sec. 1460.

Seaworthi-  
ness, what.

SEC. 2682. A ship is seaworthy, when reasonably fit to perform the services, and to encounter the ordinary perils of the voyage, contemplated by the parties to the policy.

N. Y. C. C., Sec. 1461.

At what  
time seawor-  
thiness must  
exist.

SEC. 2683. An implied warranty of seaworthiness is complied with if the ship is seaworthy at the time of the commencement of the risk.

N. Y. C. C., Sec. 1462.

What things  
are required  
to constitute  
seaworthi-  
ness.

SEC. 2684. A warranty of seaworthiness extends not only to the condition of the structure of the ship itself, but requires that it be properly laden, and provided with a competent master, a sufficient number of competent officers and seamen, and the requisite appurtenances and equipments, such as ballast, cables and anchors, cordage and sails, food, water, fuel and lights, and other necessary or proper stores and implements for the voyage.

N. Y. C. C., Sec. 1463.

Different  
degrees of  
seaworthi-  
ness at dif-  
ferent stages  
of the voy-  
age.

SEC. 2685. Where different portions of the voyage, contemplated by a policy, differ in respect to the things requisite to make the ship seaworthy therefor, a warranty of seaworthiness is complied with, if, at the commencement of each portion, the ship is seaworthy with reference to that portion.

N. Y. C. C., Sec. 1464.

SEC. 2686. When a ship becomes unseaworthy during the voyage to which an insurance relates, an unreasonable delay in repairing the defect exonerates the insurer from liability from any loss arising therefrom.

Unseaworthiness during the voyage.

N. Y. C. C., Sec. 1465.

SEC. 2687. A ship which is seaworthy for the purpose of an insurance upon the ship, may, nevertheless, by reason of being unfitted to receive the cargo, be unseaworthy for the purpose of insurance upon the cargo.

Seaworthiness for purposes of insurance on cargo.

N. Y. C. C., Sec. 1466; 1 Phil. Ins., Sec. 723.

SEC. 2688. Where the nationality or neutrality of a ship or cargo is expressly warranted, it is implied that the ship will carry the requisite documents to show such nationality or neutrality; and that it will not carry any documents which cast reasonable suspicion thereon.

Neutral papers.

N. Y. C. C., Sec. 1467.

## ARTICLE VI.

### THE VOYAGE AND DEVIATION.

SECTION 2692. Voyage insured, how determined.

2693. Course of sailing, how determined.

2694. Deviation, what.

2695. When proper.

2696. When improper.

2697. Deviation exonerates the insurer.

SEC. 2692. When the voyage contemplated by a policy is described by the places of beginning and ending, the voyage insured is one which conforms to the course of sailing fixed by mercantile usage between those places.

Voyage insured, how determined.

N. Y. C. C., Sec. 1468.

SEC. 2693. If the course of sailing is not fixed by mercantile usage, the voyage insured by a policy is the way between the places specified, which, to a master of ordinary skill and discretion, would seem the most natural, direct and advantageous.

Course of sailing, how determined.

N. Y. C. C., Sec. 1469.

SEC. 2694. Deviation is a departure from the course of the voyage insured, mentioned in the last two sections,

Deviation, what.

or an unreasonable delay in pursuing the voyage; or the commencement of an entirely different voyage.

N. Y. C. C., Sec. 1470.

When  
proper.

SEC. 2695. A deviation is proper—

1. When caused by circumstances over which neither the master nor the owner of the ship has any control.

2. When necessary to comply with a warranty, or to avoid a peril, whether insured against or not.

3. When made in good faith, and upon reasonable grounds of belief in its necessity to avoid a peril; or,

4. When made in good faith, for the purpose of saving human life, or relieving another vessel in distress.

N. Y. C. C., Sec. 1471; 3 Kent Com., 323.

When  
improper.

SEC. 2696. Every deviation, not specified in the last section, is improper.

N. Y. C. C., Sec. 1472.

Deviation  
exonerates  
the insurer.

SEC. 2697. An insurer is not liable for any loss happening to a thing insured subsequently to an improper deviation.

N. Y. C. C., Sec. 1473.

## ARTICLE VII.

### LOSS.

SECTION 2701. Total and partial loss.

2702. Partial loss.

2703. Actual and constructive total loss.

2704. Actual total loss, what.

2705. Constructive total loss.

2706. Presumed actual loss.

2707. Insurance on cargo, etc., when voyage is broken up.

2708. Cost of reshipment, etc.

2709. When insured is entitled to payment.

2710. Abandonment of goods on insurance of profits.

2711. Average loss.

2712. Insurante against total loss.

Total and  
partial loss.

SEC. 2701. A loss may be either total or partial.

N. Y. C. C., Sec. 1474.

Partial loss.

SEC. 2702. Every loss which is not total is partial.

N. Y. C. C., Sec. 1475; Bouvier's Law Dict., *Loss*.

SEC. 2703. A total loss may be either actual or constructive.

Actual and constructive total loss.

N. Y. C. C., Sec. 1476.

SEC. 2704. An actual total loss is caused by—

Actual total loss, what.

1. A total destruction of the thing insured.

2 The loss of the thing by sinking, or by being broken up.

3. Any damage to the thing which renders it valueless to the owner for the purposes for which he held it; or,

4. Any other event which entirely deprives the owner of the possession, at the port of destination, of the thing insured.

N. Y. C. C., Sec. 1477.

SEC. 2705. A constructive total loss is one which gives to a person insured a right to abandon, under Sec. 2717.

Constructive total loss.

N. Y. C. C., Sec. 1478.

SEC. 2706. An actual loss may be presumed from the continued absence of a ship without being heard of; and the length of time which is sufficient to raise this presumption depends on the circumstances of the case.

Presumed actual loss.

N. Y. C. C., Sec. 1479.

SEC. 2707. When a ship is prevented, at an intermediate port, from completing the voyage, the master must make every exertion to procure, in the same or a contiguous port, another ship, for the purpose of conveying the cargo to its destination; and the liability of a marine insurer thereon continues after they are thus reshipped.

Insurance on cargo, etc., when voyage is broken up.

N. Y. C. C., Sec. 1480.

SEC. 2708. In addition to the liability mentioned in the last section, a marine insurer is bound for damages, expenses of discharging, storage, reshipment, extra freightage, and all other expenses incurred in saving cargo reshipped pursuant to the last section, up to the amount insured.

Cost of reshipment, etc.

N. Y. C. C., Sec. 1481.

SEC. 2709. Upon an actual total loss a person insured is entitled to payment without notice of abandonment.

When insured is entitled to payment.

N. Y. C. C., Sec. 1482.

Abandon-  
ment of  
goods on  
insurance  
of profits.

SEC. 2710. Where profits are insured, but the goods are not insured, a marine insurer is not liable for a constructive total loss unless the insured offers to abandon the goods.

N. Y. C. C., Sec. 1483.

Average loss.

SEC. 2711. Where it has been agreed that an insurance upon a particular thing or class of things shall be free from particular average, a marine insurer is not liable for any loss, not depriving the insured of the possession, at the port of destination, of the whole of such thing, or class of things, even though it becomes entirely worthless.

N. Y. C. C., Sec. 1484.

Insurance  
against total  
loss.

SEC. 2712. An insurance confined in terms to a total loss, does not cover a constructive total loss, but covers any loss which necessarily results in depriving the insured of the possession, at the port of destination, of the entire thing insured, and also a general average loss.

N. Y. C. C., Sec. 1485.

## ARTICLE VIII.

### ABANDONMENT.

#### SECTION 2716. Abandonment, what.

2717. When insured may abandon.

2718. Must be unqualified.

2719. When may be made.

2720. Abandonment may be defeated.

2721. How made.

2722. Requisites of notice.

2723. No other cause can be relied on.

2724. Effect.

2725. Waiver of formal abandonment.

2726. Agents of the insured become agents of the insurer.

2727. Acceptance not necessary.

2728. Acceptance conclusive.

2729. Accepted abandonment, irrevocable.

2730. Freightage, how affected by abandonment of ship.

2731. Refusal to accept.

2732. Omission to abandon.

Abandon-  
ment, what.

SEC. 2716. Abandonment is the act by which, after a constructive total loss, a person insured by a contract of marine insurance declares to the insurer that he relinquishes to him his interest in the thing insured.

N. Y. C. C., Sec. 1486.



Sec. 2717. A person insured by a contract of marine insurance may abandon the thing insured, or any particular portion thereof, separately valued by the policy, or otherwise separately insured, and recover for a total loss thereof, when the cause of the loss is a peril insured against—

When insured may abandon.

1. If more than half thereof, in value, is actually lost, or would have to be expended to recover it from the peril.

2. If it is injured to such an extent as to reduce its value more than one-half.

3. If, the thing insured being a ship, the contemplated voyage cannot be lawfully performed, without incurring an expense to the insured of more than half the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances; or,

4. If, the thing insured being cargo or freightage, the voyage cannot be performed, nor another ship procured by the master, within a reasonable time, and with reasonable diligence, to forward the cargo, without incurring the like expense or risk. But freightage cannot in any case be abandoned, unless the ship is also abandoned.

N. Y. C. C., Sec. 1487.

Sec. 2718. An abandonment must be neither partial nor conditional.

Must be unqualified.

N. Y. C. C., Sec. 1488.

Sec. 2719. An abandonment must be made within a reasonable time after the information of the loss, and after the commencement of the voyage, and before the party abandoning has information of its completion.

When may be made.

N. Y. C. C., Sec. 1489.

Sec. 2720. Where the information upon which an abandonment has been made proves incorrect, or the thing insured was so far restored when the abandonment was made, that there was then in fact no total loss, the abandonment becomes ineffectual.

Abandonment may be defeated.

N. Y. C. C., Sec. 1490.

Sec. 2721. Abandonment is made by giving notice thereof to the insurer; which may be done orally, or in writing.

How made.

N. Y. C. C., Sec. 1491.

Requisites  
of notice.

SEC. 2722. A notice of abandonment must be **explicit**; and must specify the particular cause of the abandonment; but need state only enough to show that there is **probable** cause therefor, and need not be accompanied with **proof** of interest or of loss.

N. Y. C. C., Sec. 1492.

No other  
cause can be  
relied on.

SEC. 2723. An abandonment can be sustained **only** upon the cause specified in the notice thereof.

N. Y. C. C., Sec. 1493.

Effect.

SEC. 2724. An abandonment is equivalent to a **trans-**fer, by the insured, of his interest, to the insurer, with **all** the chances of recovery and indemnity.

N. Y. C. C., Sec. 1494.

Waiver of  
formal aban-  
donment.

SEC. 2725. If a marine insurer pays for a loss **as if** it were an actual total loss, he is entitled to **whatever** may remain of the thing insured, or its proceeds or **salvage**, **as** if there had been a formal abandonment.

N. Y. C. C., Sec. 1495.

Agents of  
the insured  
become  
agents of the  
insurer.

SEC. 2726. Upon an abandonment, acts done in **good** faith, by those who were agents of the insured in **respect** to the thing insured, subsequent to the loss, are **at the** risk of the insurer, and for his benefit.

N. Y. C. C., Sec. 1496.

Acceptance  
not neces-  
sary.

SEC. 2727. An acceptance of an abandonment is **not** necessary to the rights of the insured, and is **not to be** presumed from the mere silence of the insurer, upon his receiving notice of abandonment.

N. Y. C. C., Sec. 1497.

Acceptance  
conclusive.

SEC. 2728. The acceptance of an abandonment, whether express or implied, is **conclusive** upon the parties, and admits the loss and the sufficiency of the abandonment.

N. Y. C. C., Sec. 1498.

Accepted  
abandon-  
ment, irre-  
vocable.

SEC. 2729. An abandonment once made and **accepted** is irrevocable, unless the ground upon which it **was made** proves to be unfounded.

N. Y. C. C., Sec. 1499.

Freightage,  
how affected  
by abandon-  
ment of ship

SEC. 2730. On an accepted abandonment of a ship, freightage earned previous to the loss belongs to the

insurer thereof; but freightage subsequently earned belongs to the insurer of the ship.

N. Y. C. C., Sec. 1500.

SEC. 2731. If an insurer refuses to accept a valid abandonment, he is liable as upon an actual total loss, deducting from the amount any proceeds of the thing insured which may have come to the hands of the insured.

Refusal to accept.

N. Y. C. C., Sec. 1501.

SEC. 2732. If a person insured omits to abandon, he may nevertheless recover his actual loss.

Omission to abandon.

N. Y. C. C., Sec. 1502.

## ARTICLE IX.

### MEASURE OF INDEMNITY.

SECTION 2736. Valuation, when conclusive.

2737. Partial loss.

2738. Profits.

2739. Valuation apportioned.

2740. Valuation applied to profits.

2741. Estimating loss under an open policy.

2742. Arrival of thing damaged.

2743. Labor and expenses.

2744. General average.

2745. Contribution.

2746. One-third new for old.

SEC. 2736. A valuation in a policy of marine insurance is conclusive between the parties thereto, in the adjustment of either a partial or total loss, if the insured has some interest at risk, and there is no fraud on his part; except that when a thing has been hypothecated by bottomry or respondentia, before its insurance, and without the knowledge of the person actually procuring the insurance, he may show the real value. But a valuation fraudulent in fact entitles the insurer to rescind the contract.

Valuation, when conclusive.

N. Y. C. C., Sec. 1503 ; 3 Kent Com., 274.

SEC. 2737. A marine insurer is liable, upon a partial loss, only for such proportion of the amount insured by him, as the loss bears to the value of the whole interest of the insured in the property insured.

Partial loss.

N. Y. C. C., Sec. 1504.

**Profits.**

**SEC. 2788.** Where profits are separately insured in a contract of marine insurance, the insured is entitled to recover, in case of loss, a proportion of such profits equivalent to the proportion which the value of the property lost bears to the value of the whole.

N. Y. C. C., Sec. 1505.

**Valuation apportioned.**

**SEC. 2739.** In case of a valued policy of marine insurance on freightage or cargo, if a part only of the subject is exposed to risk, the valuation applies only in proportion to such part.

N. Y. C. C., Sec. 1506 ; 3 Kent Com., 275.

**Valuation applied to profits.**

**SEC. 2740.** When profits are valued and insured, by a contract of marine insurance, a loss of them is conclusively presumed from a loss of the property out of which they were expected to arise, and the valuation fixes their amount.

N. Y. C. C., Sec. 1507.

**Estimating loss under an open policy.**

**SEC. 2741.** In estimating a loss under an open policy of marine insurance, the following rules are to be observed :

1. The value of a ship is its value at the beginning of the risk, including all articles or charges which add to its permanent value, or which are necessary to prepare it for the voyage insured.

2. The value of cargo is its actual cost to the insured, when laden on board, or where that cost cannot be ascertained, its market value at the time and place of lading, adding the charges incurred in purchasing and placing it on board, but without reference to any losses incurred in raising money for its purchase, or to any drawback on its exportation, or to the fluctuations of the market at the port of destination, or to expenses incurred on the way or on arrival.

3. The value of freightage is the gross freightage, exclusive of primage, without reference to the cost of earning it ; and,

4. The cost of insurance is in each case to be added to the value thus estimated.

N. Y. C. C., Sec. 1508 ; 3 Kent Com., 335, 336.

**Arrival of thing damaged.**

**SEC. 2742.** If cargo insured against partial loss arrives at the port of destination in a damaged condition, the loss of the insured is deemed to be the same proportion of the

value which the market price at that port, of the thing so damaged, bears to the market price it would have brought if sound.

N. Y. C. C., Sec. 1509; 3 Kent Com., 336.

SEC. 2743. A marine insurer is liable for all the expense attendant upon a loss which forces the ship into port to be repaired; and where it is agreed that the insured may labor for the recovery of the property, the insurer is liable for the expense incurred thereby, such expense, in either case, being in addition to a total loss, if that afterwards occurs.

Labor and expenses.

N. Y. C. C., Sec. 1510; 3 Kent Com., 339.

SEC. 2744. A marine insurer is liable for a loss falling upon the insured, through a contribution in respect to the thing insured, required to be made by him towards a general average loss called for by a peril insured against.

General average.

N. Y. C. C., Sec. 1511.

SEC. 2745. Where a person insured by a contract of marine insurance has a demand against others for contribution, he may claim the whole loss from the insurer, subrogating him to his own right to contribution.

Contribution

N. Y. C. C., Sec. 1512.

SEC. 2746. In the case of a partial loss of a ship or its equipments, the old materials are to be applied towards payment for the new, and whether the ship is new or old, a marine insurer is liable for only two-thirds of the remaining cost of the repairs, except that he must pay for anchors and cannon in full, and for sheathing metal at a depreciation of only two and one-half per cent. for each month that it has been fastened to the ship.

One-third new for old.

N. Y. C. C., Sec. 1513.

## CHAPTER III.

### FIRE INSURANCE.

SECTION 2752. False representation.

2753. Alteration increasing risk.

2754. Alteration not increasing risk.

2755. Acts of the insured.

2756. Measure of indemnity.

False representation.

SEC. 2752. An insurance against fire is not affected by concealment, nor by the falsity of a representation not inserted in the policy, though in a material particular, unless made with a fraudulent intent.

N. Y. C. C., Sec. 1514.

Alteration increasing risk.

SEC. 2753. An alteration in the use or condition of a thing insured, from that to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured, and increasing the risk, entitles an insurer to rescind a contract of fire insurance.

N. Y. C. C., Sec. 1515; Ang. Ins., 206.

Alteration not increasing risk.

SEC. 2754. An alteration in the use or condition of a thing insured, from that to which it is limited by the policy, which does not increase the risk, does not affect a contract of fire insurance.

N. Y. C. C., Sec. 1516.

Acts of the insured.

SEC. 2755. A contract of fire insurance is not affected by any act of the insured, subsequent to the execution of the policy, which does not violate its provisions, even though it increases the risk, and is the cause of a loss.

N. Y. C. C., Sec. 1517.

Measure of indemnity.

SEC. 2756. If there is no valuation in the policy, the measure of indemnity in an insurance against fire is the expense, at the time that the loss is payable, of replacing the thing lost or injured in the condition in which it was at the time of the injury; but the effect of a valuation in a policy of fire insurance is the same as in a policy of marine insurance.

N. Y. C. C., Sec. 1518.

## CHAPTER IV.

### LIFE AND HEALTH INSURANCE.

SECTION 2762. Insurance upon life, when payable.

2763. Insurable interest.

2764. Assignee, etc., of life policy need have no interest.

2765. Notice of transfer.

2766. Measure of indemnity.

Insurance upon life, when payable.

SEC. 2762. An insurance upon life may be made payable on the death of the person, or on his surviving a

specified period, or periodically so long as he shall live, or otherwise contingently on the continuance or determination of life.

N. Y. C. C., Sec. 1519.

SEC. 2763. Every person has an insurable interest in the life and health— Insurable interest.

1. Of himself.
2. Of any person on whom he depends wholly or in part for education or support.
3. Of any person under a legal obligation to him for the payment of money, or respecting property or services, of which death or illness might delay or prevent the performance; and,
4. Of any person upon whose life any estate or interest vested in him depends.

A sister has an insurable interest in the life of her brother, who stands in place of a parent to her. (Lord vs. Dall, 12 Mass., 115.)

N. Y. C. C., Sec. 1520.

SEC. 2764. A policy of insurance upon life or health may pass by transfer, will or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered. Assignee, etc., of life policy need have no interest.

N. Y. C. C., Sec. 1521.

SEC. 2765. Notice to an insurer of a transfer or bequest thereof is not necessary to preserve the validity of a policy of insurance upon life or health, unless thereby expressly required. Notice of transfer.

N. Y. C. C., Sec. 1522; Ang. Ins., 413.

SEC. 2766. Unless the interest of a person insured is susceptible of exact pecuniary measurement, the measure of indemnity under a policy of insurance upon life or health is the sum fixed in the policy. Measure of indemnity.

N. Y. C. C., Sec. 1523.

NOTE.—This Title is adopted as a body from the New York Civil Code. The various notes of the New York Code Commissioners are not reprinted, for economical reasons. Duer "on Insurance" is of frequent reference, and the sections generally are drawn from the New York decisions and eminent writers on the Law of Insurance. As a whole, we think it well adapted to our State, and recommend its adoption.

## TITLE XII.

## INDEMNITY.

SECTION 2772. Indemnity, what.

2773. Indemnity for a future wrongful act, void.

2774. Indemnity for a past wrongful act, valid.

2775. Indemnity extends to acts of agents.

2776. Indemnity to several.

2777. Person indemnifying, liable jointly or severally with person indemnified.

2778. Rules for interpreting agreement of indemnity.

2779. When person indemnifying is a surety.

2780. Bail, what.

2781. How regulated.

Indemnity,  
what.

SEC. 2772. Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.

N. Y. C. C., Sec. 1524.

Indemnity  
for a future  
wrongful  
act, void.

SEC. 2773. An agreement to indemnify a person against an act thereafter to be done is void, if the act is known by such person, at the time of doing it, to be wrongful.

N. Y. C. C., Sec. 1525.

Indemnity  
for a past  
wrongful  
act, valid.

SEC. 2774. An agreement to indemnify a person against an act already done, is valid, even though the act was known to be wrongful, unless it was a felony.

N. Y. C. C., Sec. 1526.

Indemnity  
extends to  
acts of agents

SEC. 2775. An agreement to indemnify against the acts of a certain person, applies not only to his acts, and their consequences, but also to those of his agents.

N. Y. C. C., Sec. 1527.

Indemnity  
to several.

SEC. 2776. An agreement to indemnify several persons applies to each, unless a contrary intention appears.

N. Y. C. C., Sec. 1528.

Person in-  
demnifying,  
liable jointly  
or severally  
with person  
indemnified.

SEC. 2777. One who indemnifies another against an act to be done by the latter, is liable jointly with the person indemnified, and separately, to every person injured by such act.

N. Y. C. C., Sec. 1529.



SEC. 2778. In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears :

Rules for  
interpreting  
agreement  
of indemnity

1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.

2. Upon an indemnity against claims, or demands, or damages or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.

3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defence against such claims, demands or liability incurred in good faith, and in the exercise of a reasonable discretion.

4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defences, if he chooses to do so.

5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith, is conclusive in his favor against the former.

6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defence, judgment against the latter is only presumptive evidence against the former.

7. A stipulation that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he had a good defence upon the merits, which by want of ordinary care he failed to establish in the action.

N. Y. C. C., Sec. 1530.

SEC. 2779. Where one, at the request of another, engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, he is entitled to be reimbursed in the same manner as a surety, for whatever he may pay.

When per-  
son indem-  
nifying is a  
surety.

N. Y. C. C., Sec. 1531.

**Bail, what.** SEC. 2780. Upon those contracts of indemnity which are taken in legal proceedings, as security for the performance of an obligation imposed or declared by the tribunals, and known as undertakings or recognizances, the sureties are called bail.

N. Y. C. C., Sec. 1532.

**How regulated.** SEC. 2731. The obligations of bail are governed by the statutes specially applicable thereto.

N. Y. C. C., Sec. 1533.

## TITLE XIII.

### GUARANTY.

#### CHAPTER I. GUARANTY IN GENERAL. II. SURETYSHIP.

### CHAPTER I.

#### GUARANTY IN GENERAL.

##### ARTICLE I. DEFINITION OF GUARANTY.

##### II. CREATION OF GUARANTY.

##### III. INTERPRETATION OF GUARANTY.

##### IV. LIABILITY OF GUARANTORS.

##### V. CONTINUING GUARANTY.

##### VI. EXONERATION OF GUARANTORS.

### ARTICLE I.

#### DEFINITION OF GUARANTY.

SECTION 2787. Guaranty, what.

2788. Knowledge of principal not necessary to creation of guaranty.

**Guaranty, what.** SEC. 2787. A guaranty is a promise to answer for the debt, default or miscarriage of another person.

This definition is in the precise language of the statute of frauds (2 R. S., 135, Sec. 2), except that it omits the word "special" before "promise." It of course includes a contract of suretyship, but every guarantor is not necessarily a surety.

N. Y. C. C., Sec. 1534.

NOTE.—Sec. 12 of our statute of frauds is an exact copy of the New York statute. The second subdivision of the section is the one embraced in the text.

SEC. 2788. A person may become guarantor even without the knowledge or consent of the principal.

N. Y. C. C., Sec. 1535.

Knowledge of principal not necessary to creation of guaranty.

## ARTICLE II.

### CREATION OF GUARANTY.

SECTION 2792. Necessity of a consideration.

2793. Guaranty to be in writing, etc.

2794. Engagement to answer for obligation of another, when deemed original.

2795. Acceptance of guaranty.

SEC. 2792. Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms, with that obligation, a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.

Necessity of a consideration.

See *Mallory vs. Gillett*, 21 N. Y., 412. The person to whom a guaranty is made, is here called the *guarantee*. This is the proper legal meaning of the word (see *Bouvier's Dictionary*, also *Webster and Worcester*), although it is often used in another sense.

N. Y. C. C., Sec. 1536.

SEC. 2793. Except as prescribed by the next section, a guaranty must be in writing, and signed by the guarantor; but the writing need not express a consideration.

Guaranty to be in writing, etc.

The familiar provision of the Revised Statutes made every special promise to answer for the debt, default or miscarriage of another person, void, unless "some note or memorandum thereof *expressing the consideration* be in writing, etc. (2 Rev. Stats., 135, Sec. 2, Subd. 2). In the draft of this Code, the Commissioners recommended that the requirement that the consideration be expressed, should be omitted (Dr. Civ. Code, Sec. 1380). This change in the law has since been made by the Legislature, by Laws of 1863, Chap. 464; and the section in the text, therefore, corresponds to the existing law.

The Commissioners have inserted in the text an express provision that the writing need not express a consideration, because by the section immediately preceding an actual consideration is necessary to support a guaranty in some cases, while in others none is required. It has been lately held by the Court of Appeals that a contract required by the statute of frauds to be in writing, cannot be partly in writing and partly oral; thus, where a writing relating to a contract for

the sale of land fixes the price, but refers to "terms as specified," which are not stated in writing, the memorandum is insufficient, and cannot be made good by oral evidence of the time agreed upon for payment (*Wright vs. Weeks*, 25 N. Y., 153). If, therefore, the section in the text should simply omit the former provision of the statute requiring the consideration to be stated, it might be exposed to the construction that in all those cases in which the consideration is made, by the previous section, essential to the contract, it must be stated in reducing the contract to writing.

In England the statute, 19 and 20 Vic., Chap. 97, Sec. 3, enables a party to prove the consideration of a guaranty by parol. So in Maine (Rev. Stats., 631).

N. Y. C. C., Sec. 1537.

Engagement  
to answer for  
obligation  
of another,  
when deem'd  
original.

SEC 2794. A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promiser, and need not be in writing:

1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation in whole or in part, in consideration of such promise.

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety.

3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promiser, whether moving from either party to the antecedent obligation, or from another person.

4. Where a factor undertakes, for a commission, to sell merchandise and guaranty the sale.

5. Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument.

N. Y. C. C., Sec. 1538.

SEC. 2795. A mere offer to guaranty is not binding, until notice of its acceptance is communicated by the guaranty to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance.

Acceptance  
of guaranty.

N. Y. C. C., Sec. 1539.

### ARTICLE III.

#### INTERPRETATION OF GUARANTY.

SECTION 2799. Guaranty of incomplete contract.

2800. Guaranty that an obligation is good or collectible.

2801. Recovery upon such guaranty.

2802. Guarantor's liability upon such guaranty.

SEC. 2799. In a guaranty of a contract, the terms of which are not then settled, it is implied that its terms shall be such as will not expose the guarantor to greater risks than he would incur under those terms which are most common, in similar contracts, at the place where the principal contract is to be performed.

Guaranty of  
incomplete  
contract.

N. Y. C. C., Sec. 1540.

SEC. 2800. A guaranty to the effect that an obligation is good, or is collectible, imports that the debtor is solvent, and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence.

Guaranty  
that an obli-  
gation is  
good or col-  
lectible.

Thus a guaranty in these words, indorsed on a note, "I hereby guaranty the collection of the within note," imports a promise that the note can be collected of the maker, if the holder, within a reasonable time and with due diligence, prosecutes the same to judgment and execution against the maker. This obligation to prosecute within a reasonable time, and with due diligence, is a condition precedent to the liability of the maker. What is a reasonable time depends on the circumstances of each case. Generally, delay which cannot have prejudiced the guarantor, will not discharge him (*Gallagher vs. White*, 31 Barb., 92; see also *Curtis vs. Smallman*, 14 Wend., 231; *Cooke vs. Nathan*, 16 Barb., 342; *Vanderveer vs. Wright*, 6 id., 547; *Warfield vs. Watkins*, 30 Barb., 395).

N. Y. C. C., Sec. 1541.

SEC. 2801. A guaranty, such as is mentioned in the last section, is not discharged by an omission to take proceedings upon the principal debt, or upon any collateral security for its payment, if no part of the debt could have been collected thereby.

Recovery  
upon such  
guaranty.

In *Cady vs. Sheldon* (39 Barb., 103), the defendants, upon an assignment of a bond and mortgage, made a guaranty in these words: "In consideration of, etc., we guaranty the collection of said bond." On the trial of an action on this guaranty, before a Referee, it appeared that the obligors in the bond were insolvent, and unable to pay any part of the bond, and that the premises covered by the mortgage had been sold under a prior mortgage for less than the amount due upon it. The Referee, however, nonsuited the plaintiffs. And upon appeal, one question raised was, whether the omission to sue the obligors, or attempt a foreclosure of the mortgage, precluded the plaintiffs from recovering upon the guaranty. The Court, after reviewing numerous cases (*Cumpston vs. McNair*, 1 Wend., 457; *Moakley vs. Riggs*, 19 Johns., 69; *Thomas vs. Woods*, 4 Cow., 173; *Loveland vs. Sheppard*, 2 Hill, 139; *Burt vs. Horner*, 5 Barb., 501; *Vanderveer vs. Wright*, 6 Barb., 547; *Curtis vs. Smallman*, 14 Wend., 231; *White vs. Case*, 13 Wend., 543; *Kies vs. Tift*, 1 Cow., 98; *Eddy vs. Stanton*, 21 Wend., 255; *People vs. Jansen*, 7 Johns., 332; *Hart vs. Hudson*, 6 Duer, 303; *Taylor vs. Bullen*, 6 Cow., 624; *Gallagher vs. White*, 31 Barb., 94; *Morris vs. Wadsworth*, 11 Wend., 100; 17 id., 103; *Merritt vs. Lincoln*, 21 Barb., 249; *Newell vs. Fowler*, 23 Barb., 632), stated the following principles as supported by the weight of authority:

1. That a guaranty of collection implies that a note or other evidence of debt is good and collectible against the principal debtors; and this means collectible by due course of law.

2. That, ordinarily to test that question, it is necessary that the usual legal proceedings should be resorted to, to wit, a judgment and execution against the parties primarily liable to pay; and a return of an execution unsatisfied is primarily sufficient evidence that it is not collectible.

3. That it is not indispensable that legal proceedings should be resorted to, to test the collectibility of the paper, if it otherwise satisfactorily appears that a resort to such proceedings would be ineffectual; and proof that the principal debtors, from the period of the maturity of the debt, have been uniformly insolvent and unable to pay any part of the debt, is sufficient evidence for this purpose.

4. That legal proceedings are not a condition precedent to the liability of the guarantor, but equivalent evidence of inability to collect any part of the debt will suffice; and that, however desirable it may be to have one uniform rule—*e. g.*, the return of an execution unsatisfied against the principal debtor—as the test of the collectibility of a debt, the weight of authority does not allow that rule to be adopted.

N. Y. C. C., Sec. 1542.

Guarantor's  
liability  
upon such  
guaranty.

Sec. 2802. In the cases mentioned in Sec. 2800, the removal of the principal from the State, leaving no property therein from which the obligation might be satisfied, is equivalent to the insolvency of the principal, in its effect upon the rights and obligations of the guarantor.

This is the principle adopted in *Cooke vs. Nathan*, 16 Barb., 342; but see *White vs. Case*, 13 Wend., 543; *Burt vs. Horner*, 5 Barb., 501; *Newell vs. Fowler*, 23 Barb., 628.

N. Y. C. C., Sec. 1543.

## ARTICLE IV.

## LIABILITY OF GUARANTORS.

SECTION 2806. Guaranty, how construed.

2807. Liability upon guaranty of payment or performance.

2808. Liability upon guaranty of a conditional obligation.

2809. Obligation of guarantor cannot exceed that of the principal.

2810. Guarantor not liable on an illegal contract.

SEC. 2806. A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor.

Guaranty  
how con-  
strued.

N. Y. C. C., Sec. 1544.

SEC. 2807. A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice.

Liability  
upon guar-  
anty of pay-  
ment or per-  
formance.

N. Y. C. C., Sec. 1545.

SEC. 2808. Where one guaranties a conditional obligation, his liability is commensurate with that of the principal, and he is not entitled to notice of the default of the principal, unless he is unable, by the exercise of reasonable diligence, to acquire information of such default, and the creditor has actual notice thereof.

Liability  
upon guar-  
anty of a  
conditional  
obligation.

N. Y. C. C., Sec. 1546.

SEC. 2809. The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation.

Obligation of  
guarantor  
cannot ex-  
ceed that of  
the principal

N. Y. C. C., Sec. 1547.

SEC. 2810. A guarantor is not liable if the contract of the principal is unlawful; but he is liable notwithstanding any mere personal disability of the principal, though the disability be such as to make the contract void against the principal.

Guarantor  
not liable on  
an illegal  
contract.

N. Y. C. C., Sec. 1548.

## ARTICLE V.

## CONTINUING GUARANTY.

SECTION 2814. Continuing guaranty, what.

2815. Revocation.

Continuing  
guaranty,  
what.

SEC. 2814. A guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability or from time to time renew it after it has been satisfied, is called a continuing guaranty.

N. Y. C. C., Sec. 1549.

Revocation.

SEC. 2815. A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions, which he does not renounce.

N. Y. C. C., Sec. 1550.

## ARTICLE VI.

### EXONERATION OF GUARANTORS.

SECTION 2819. What dealings with debtor exonerate guarantor.

2820. Void promises.

2821. Rescission of alteration.

2822. Part performance.

2823. Delay of creditor does not discharge guarantor.

2824. Guarantor indemnified by the debtor, not exonerated.

2825. Discharge of principal by act of law does not discharge guarantor.

What deal-  
ings with  
debtor  
exonerate  
guarantor.

SEC. 2819. A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.

N. Y. C. C., Sec. 1551.

Void  
promises.

SEC. 2820. A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy, within the meaning of the last section.

N. Y. C. C., Sec. 1552.

Rescission of  
alteration.

SEC. 2821. The rescission of an agreement altering the original obligation of a debtor, or impairing the remedy of a creditor, does not restore the liability of a guarantor who has been exonerated by such agreement.

N. Y. C. C., Sec. 1553.



SEC. 2822. The acceptance, by a creditor, of any thing in partial satisfaction of an obligation, reduces the obligation of a guarantor thereof, in the same measure as that of the principal, but does not otherwise affect it.

Part performance.

N. Y. C. C., Sec. 1554.

SEC. 2823. Mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor.

Delay of creditor does not discharge guarantor.

N. Y. C. C., Sec. 1555.

SEC. 2824. A guarantor, who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the assent of the guarantor, may have modified the contract or released the principal.

Guarantor indemnified by the debtor not exonerated.

N. Y. C. C., Sec. 1556.

SEC. 2825. A guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor.

Discharge of principal by act of law does not discharge guarantor.

N. Y. C. C., Sec. 1557.

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## CHAPTER II.

### SURETYSHIP.

- ARTICLE
- I. WHO ARE SURETIES.
  - II. LIABILITY OF SURETIES.
  - III. RIGHTS OF SURETIES.
  - IV. RIGHTS OF CREDITORS.
  - V. LETTER OF CREDIT.

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#### ARTICLE I.

##### WHO ARE SURETIES.

SECTION 2831. Surety, what.

2832. Apparent principal may show that he is surety.

SEC. 2831. A surety is one who, at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor.

Surety, what

The common definition of a surety (see Webster's, Wharton's and Burrill's Dictionaries), cannot be distinguished from that of a guarantor, and clearly covers the case of an indorser. But an indorser is not necessarily a surety (*Pitts vs. Congdon*, 2 N. Y., 352; *Hurd vs. Little*, 12 Mass., 502). nor is a guarantor, although their rights are in some important respects alike.

The distinction between a surety and a mere guarantor is, that the former enters into the contract primarily for the benefit of the debtor, while with the latter the benefit of the principal debtor is no material part of the inducement to him to contract.

N. Y. C. C., Sec. 1558.

Apparent principal may show that he is surety.

**Sec. 2832.** One who appears to be a principal, whether by the terms of a written instrument, or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal.

So held as between the parties themselves (*Rouse vs. Whited*, 25 N. Y., 170; *Barry vs. Ransom*, 12 id., 448; *Griffiths vs. Reed*, 21 Wend., 502); and so as to third persons in equity (*Hollier vs. Eyre*, 9 Clark & Fin., 1; *Davies vs. Stainbank*, 6 De G., M. & G., 679). At common law, the rule excluding oral evidence to vary a written contract excluded evidence to show that the apparent principal was a surety (*Harrison vs. Courtauld*, 3 B. & Ad., 36; *Fentim vs. Pocock*, 5 Taunt., 192; see, however, *Archer vs. Douglas*, 5 Denio, 509); and upon the authority of these cases alone—the decisions in equity not being cited by counsel on either side—the same rule has been followed in a recent case in this State (*Howard Banking Co. vs. Welchman*, 6 Bosw., 280). The fusion of law and equity in this State has superseded the common law rule. In England, since equitable defences have been admitted in common law Courts, the equitable rule has been followed and defined as in the text, by all the Judges (*Pooley vs. Harradine*, 7 El. & Bl., 431; *Greenough vs. McClelland*, 2 El. & El., 424; 6 Jur. [N. S.], 772; 30 L. J. [Q. B.], 15; *Taylor vs. Burgess*, 5 Hurlst. & N., 1). And see *Mohawk and Hudson River R. R. Co. vs. Costigan*, 2 Sandf. Ch., 306; *Archer vs. Douglass*, 5 Denio, 509. Compare *Casey vs. Brabason*, 10 Abb. Pr., 368; *Gahn vs. Niemcewicz*, 11 Wend., 312; *Elwood vs. Diefendorf*, 5 Barb., 398; *Chester vs. Bank of Kingston*, 16 N. Y., 336). The same rule is established in Massachusetts (*Weston vs. Chamberlin*, 7 Cush., 404; *Carpenter vs. King*, 9 Metc., 511; *Harris vs. Brooks*, 21 Pick., 195.)

N. Y. C. C., Sec. 1559.

## ARTICLE II.

### LIABILITY OF SURETIES.

**SECTION 2836.** Limit of surety's obligation.

2837. Rules of interpretation.

2838. Judgment against surety does not alter the relation.

2839. Surety exonerated by performance or offer of performance.

2840. Surety discharged by certain acts of the creditor.

SEC. 2836. A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty.

Limit of  
surety's  
obligation.

N. Y. C. C., Sec. 1560.

SEC. 2837. In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts.

Rules of  
interpreta-  
tion.

N. Y. C. C., Sec. 1561.

SEC. 2838. Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety.

Judgment  
against  
surety does  
not alter the  
relation.

N. Y. C. C., Sec. 1562.

SEC. 2839. Performance of the principal obligation, or an offer of such performance, duly made, whether by the principal or by another person, exonerates a surety.

Surety exon-  
erated by  
performance  
or offer of  
performance

This rule seems just, though not fully supported by any express decision. As between the creditor and the principal debtor, the former is not bound to accept payment from a stranger, but as respects the surety, he ought to do so.

N. Y. C. C., Sec. 1563.

SEC. 2840. A surety is exonerated—

1. In like manner with a guarantor;
2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or,
3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do.

Surety dis-  
charged by  
certain acts  
of the  
creditor.

N. Y. C. C., Sec. 1564.

### ARTICLE III.

#### RIGHTS OF SURETIES.

SECTION 2844. Surety has rights of guarantor.

2845. Surety may require the creditor to proceed against the principal.

2846. Surety may compel principal to perform obligation, when due.

2847. A principal bound to reimburse his surety.

SECTION 2848. The surety acquires the right of the creditor.

2849. Surety entitled to benefit of securities held by creditor.

2850. The property of principal to be taken first.

Surety has  
rights of  
guarantor.

SEC. 2844. A surety has all the rights of a guarantor, whether he becomes personally responsible or not.

N. Y. C. C., Sec. 1565.

Surety may  
require the  
creditor to  
proceed  
against the  
principal.

SEC. 2845. A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced.

N. Y. C. C., Sec. 1566.

Surety may  
compel prin-  
cipal to per-  
form obliga-  
tion, when  
due.

SEC. 2846. A surety may compel his principal to perform the obligation when due.

N. Y. C. C., Sec. 1567.

A principal  
bound to  
reimburse  
his surety.

SEC. 2847. If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act, except as prescribed by the next section.

N. Y. C. C., Sec. 1568.

The surety  
acquires the  
right of the  
creditor.

SEC. 2848. A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal, to the extent of reimbursing what he has expended; and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such.

N. Y. C. C., Sec. 1569.

Surety  
entitled to  
benefit of  
securities  
held by  
creditor.

SEC. 2849. A surety is entitled to the benefit of every security, for the performance of the principal obligation, held by the creditor, or by a co-surety, at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not.

N. Y. C. C., Sec. 1570.

The property  
of principal  
to be taken  
first.

SEC. 2850. Whenever property of a surety is hypothecated with property of the principal, the surety is enti-

tled to have the property of the principal first applied to the discharge of the obligation.

N. Y. C. C., Sec. 1571.

#### ARTICLE IV.

##### RIGHTS OF CREDITORS.

SECTION 2854. Creditor entitled to benefit of securities held by surety.

SEC. 2854. A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation; and may, upon the maturity of the obligation, compel the application of such security to its satisfaction.

Creditors  
entitled to  
benefit of  
securities  
held by  
surety.

N. Y. C. C., Sec. 1572.

#### ARTICLE V.

##### LETTER OF CREDIT.

SECTION 2858. Letter of credit, what.

2859. How addressed.

2860. Liability of the writer.

2861. Letters of credit either general or special.

2862. Nature of general letter of credit.

2863. Extent of general letter of credit.

2864. A letter of credit may be a continuing guaranty.

2865. When notice to the writer necessary.

2866. The credit given must agree with the terms of the letter.

SEC. 2858. A letter of credit is a written instrument, addressed by one person to another, requesting the latter to give credit to the person in whose favor it is drawn.

Letter of  
credit, what.

N. Y. C. C., Sec. 1573.

SEC. 2859. A letter of credit may be addressed to several persons in succession.

How  
addressed.

N. Y. C. C., Sec. 1574.

SEC. 2860. The writer of a letter of credit is, upon the default of the debtor, liable to those who gave credit in compliance with its terms.

Liability of  
the writer.

N. Y. C. C., Sec. 1575.

SEC. 2861. A letter of credit is either general or special. When the request for credit, in a letter, is addressed

Letters of  
credit either  
general or  
special.

to specified persons by name or description, the letter is special. All other letters of credit are general.

N. Y. C. C., Sec. 1576.

Nature of  
general  
letter of  
credit.

SEC. 2862. A general letter of credit gives any person to whom it may be shown authority to comply with its request, and by his so doing it becomes, as to him, of the same effect as if addressed to him by name.

N. Y. C. C., Sec. 1577.

Extent of  
general  
letter of  
credit.

SEC. 2863. Several persons may successively give credit upon a general letter.

N. Y. C. C., Sec. 1578.

A letter of  
credit may  
be a contin-  
uing  
guaranty.

SEC. 2864. If the parties to a letter of credit appear, by its terms, to contemplate a course of future dealing between the parties, it is not exhausted by giving a credit, even to the amount limited by the letter, which is subsequently reduced or satisfied by payments made by the debtor; but is to be deemed a continuing guaranty.

N. Y. C. C., Sec. 1579.

When notice  
to the writer  
necessary.

SEC. 2865. The writer of a letter of credit is liable for credit given upon it without notice to him, unless its terms express or imply the necessity of giving notice.

N. Y. C. C., Sec. 1580.

The credit  
given must  
agree with  
the terms of  
the letter.

SEC. 2866. If a letter of credit prescribes the persons by whom, or the mode in which, the credit is to be given, or the term of credit, or limits the amount thereof, the writer is not bound except for transactions which, in these respects, conform strictly to the terms of the letter.

N. Y. C. C., Sec. 1581.

## TITLE XIV.

### LIEN.

#### CHAPTER I. LIENS IN GENERAL.

##### II. MORTGAGE.

##### III. PLEDGE.

##### IV. BOTTOMRY.

##### V. RESPONDENTIA.

##### VI. OTHER LIENS.

##### VII. STOPPAGE IN TRANSIT.

Although the arrangement of this subject is novel, the Commissioners believe that its propriety and advantages will be perceived at a glance. Mortgages are liens, and, under the provisions of this Code, nothing more. They are subject, therefore, to all the general rules of liens.

## CHAPTER I.

### LIENS IN GENERAL.

#### ARTICLE I. DEFINITION OF LIENS.

##### II. CREATION OF LIENS.

##### III. EFFECT OF LIENS.

##### IV. PRIORITY OF LIENS.

##### V. REDEMPTION FROM LIENS.

##### VI. EXTINCTION OF LIENS.

## ARTICLE I.

### DEFINITION OF LIENS.

SECTION 2872. Lien, what.

2873. Liens, general or special.

2874. General lien, what.

2875. Special lien, what.

2876. Prior liens.

2877. Contracts subject to provisions of this chapter.

SEC. 2872. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act. Lien, what.

A lien is commonly defined as a right to retain possession of a specific thing, until some charge attached to it is satisfied. (Story Eq. Jur., Sec. 506; 3 Pars. Cont., 5th ed., 234). This definition is a very narrow one, and applicable only to common law liens, exclusive of mortgages, bottomry and respondentia bonds, etc.

In equity, possession was not essential. There might be an equitable lien upon a fund or subject in the hands of another, which could be maintained and enforced without the lienor's having possession, if the identity of the subject could be distinctly traced (*Grinnell vs. Suydam*, 3 Sandf., 132). The Commissioners wish to preserve, under one name, both the common law and the equitable liens, and have sought to bring under one head all the general principles which affect liens by possession or mortgage.

N. Y. C. C., Sec. 1582.

NOTE.—Definition of Lien, Sec. 1180, constituting Chap. I, Tit. IV, Part III, Code of Civil Procedure, should be omitted from that Code.

Existence of  
lien does not  
affect the  
right of  
creditor.

SEC. 2892. The existence of a lien, as security for the performance of an obligation, does not affect the right of the creditor to enforce the obligation without regard to the lien.

N. Y. C. C., Sec. 1595.

Holder of  
lien not  
entitled to  
compensa-  
tion.

SEC. 2893. One who holds property by virtue of a lien thereon, is not entitled to compensation from the owner thereof for any trouble or expense which he incurs respecting it, except to the same extent as a borrower, under Secs. 1892 and 1893.

N. Y. C. C., Sec. 1596.

#### ARTICLE IV.

##### PRIORITY OF LIENS.

SECTION 2897. Priority of liens.

2898. Priority of mortgage for price.

2899. Order of resort to different funds.

Priority of  
liens.

SEC. 2897. Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia.

N. Y. C. C., Sec. 1597.

Priority of  
of mortgage  
for price.

SEC. 2898. A mortgage given for the price of real property, at the time of its conveyance, has priority over all other liens created against the purchaser, subject to the operation of the recording laws.

N. Y. C. C., Sec. 1598.

Order of  
resort to  
different  
funds.

SEC. 2899. Where one has a lien upon several things, and other persons have subordinate liens upon, or interests in, some but not all of the same things, the person having the prior lien, if he can do so without risk of loss to himself, or of injustice to other persons, must resort to the property in the following order, on the demand of any party interested :

1. To the things upon which he has an exclusive lien.
2. To the things which are subject to the fewest subordinate liens.
3. In like manner inversely to the number of subordinate liens upon the same thing ; and,



4. When several things are within one of the foregoing classes, and subject to the same number of liens, resort must be had—

(1.) To the things which have not been transferred since the prior lien was created.

(2.) To the things which have been so transferred without a valuable consideration; and,

(3.) To the things which have been so transferred for a valuable consideration.

N. Y. C. C., Sec. 1599.

## ARTICLE V.

### REDEMPTION FROM LIEN.

SECTION 2903. Right to redeem.

2904. Rights of inferior lienor.

2905. Redemption from lien, how made.

Sec. 2903. Every person, having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed.

Right to  
redeem.

N. Y. C. C., Sec. 1600.

Sec. 2904. One who has a lien inferior to another, upon the same property, has a right—

Rights of  
inferior  
lienor.

1. To redeem the property in the same manner as its owner might, from the superior lien; and,

2. To be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby.

N. Y. C. C., Sec. 1601.

Sec. 2905. Redemption from a lien is made by performing, or offering to perform, the act for the performance of which it is a security, and paying, or offering to pay, the damages, if any, to which the holder of the lien is entitled for delay.

Redemption  
from lien,  
how made.

N. Y. C. C., Sec. 1602.

## ARTICLE VI.

## EXTINCTION OF LIENS.

SECTION 2909. Lien deemed accessory to the act whose performance it secures.

2910. Extinction by sale or conversion.

2911. Lien not extinguished by lapse of time under statute of limitation.

2912. Apportionment of lien.

2913. When restoration extinguishes lien.

Lien deemed accessory to the act whose performance it secures.

SEC. 2909. A lien is to be deemed accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.

N. Y. C. C., Sec. 1603.

Extinction by sale or conversion.

SEC. 2910. The sale of any property on which there is a lien, in satisfaction of the claim secured thereby, or, in case of personal property, its wrongful conversion by the person holding the lien, extinguishes the lien thereon.

N. Y. C. C., Sec. 1604.

Lien not extinguished by lapse of time under statute of limitation.

SEC. 2911. A lien is extinguished by the lapse of the time within which, under the provisions of the CODE or CIVIL PROCEDURE, an action can be brought upon the principal obligation.

N. Y. C. C., Sec. 1605.

Apportionment of lien.

SEC. 2912. The partial performance of an act secured by a lien does not extinguish the lien upon any part of the property subject thereto, even if it is divisible.

N. Y. C. C., Sec. 1606.

When restoration extinguishes lien.

SEC. 2913. The voluntary restoration of property to its owner, by the holder of a lien thereon, dependent upon possession, extinguishes the lien, as to such property, unless otherwise agreed by the parties; and extinguishes it, notwithstanding any such agreement, as to creditors of the owner and persons acquiring a title to the property, or a lien thereon, in good faith, and for a good consideration; unless such restoration is made to the owner as a mere employé of the holder of the lien, or for a merely transient purpose.

N. Y. C. C., Sec. 1607.

## CHAPTER II.

## MORTGAGE.

## ARTICLE I. MORTGAGES IN GENERAL.

## II. MORTGAGE OF REAL PROPERTY.

## III. MORTGAGE OF PERSONAL PROPERTY.

## ARTICLE I.

## MORTGAGES IN GENERAL.

## SECTION 2919. Mortgage, what.

2920. Lien of a mortgage, when special.

2921. Transfer of interest, when deemed a mortgage.

2922. Provisions of this chapter do not affect bottomry or respondentia.

2923. Transfer made subject to defeasance, may be proved.

2924. What interests may be mortgaged.

2925. Property adversely held may be mortgaged.

2926. Power of sale.

2927. Power of sale, how executed.

2928. On what a lien.

2929. Mortgage of thing held adversely.

2930. Mortgage does not entitle mortgagee to possession.

2931. Foreclosure.

2932. Waste.

Sec. 2919. Mortgage is a contract, by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession.

Mortgage,  
what.

N. Y. C. C., Sec. 1608.

Sec. 2920. The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession.

Lien of a  
mortgage,  
when special

N. Y. C. C., Sec. 1609.

Sec. 2921. Every transfer of an interest in property, made only as a security for the performance of another act, is to be deemed a mortgage, except when, in the case of personal property, it is accompanied by an actual change of possession, in which case it is to be deemed a pledge.

Transfer of  
interest,  
when  
deemed a  
mortgage.

N. Y. C. C., Sec. 1610.

Provisions of  
this chapter  
do not affect  
bottomry or  
respondentia

SEC. 2922. Contracts of bottomry or respondentia, although in the nature of mortgages, are not affected by any of the provisions of this chapter.

N. Y. C. C., Sec. 1611.

Transfer  
made subject  
to defeas-  
ance, may  
be proved.

SEC. 2923. The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved [except as against a recorded instrument acquired in good faith and for a value, or encumbrances acquired in good faith and recorded by authority of any existing law], though the fact does not appear by the terms of the instrument.

N. Y. C. C., Sec. 1612.

What  
interests  
may be  
mortgaged.

SEC. 2924. Any interest in property, which is capable of being transferred, may be mortgaged.

N. Y. C. C., Sec. 1613.

Property  
adversely  
held may be  
mortgaged.

SEC. 2925. A mortgage may be created upon property held adversely to the mortgageor.

N. Y. C. C., Sec. 1614.

Power of  
sale.

SEC. 2926. A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security.

N. Y. C. C., Sec. 1615.

Power of  
sale, how  
executed.

SEC. 2927. A power of sale under a mortgage is a trust, and can be executed only in the manner prescribed by the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 1616.

NOTE.—Chap. II, Tit. II, Part III, New York Code of Civil Procedure, ought to be arranged and placed in our Code of Civil Procedure, or this section struck out.

On what a  
lien.

SEC. 2928. A mortgage is a lien upon everything that would pass by a grant of the property, and upon nothing more.

N. Y. C. C., Sec. 1617.

Mortgage of  
thing held  
adversely.

SEC. 2929. A mortgage of property held adversely to the mortgageor takes effect from the time at which he, or one claiming under him, obtains possession of the property; but has precedence over every lien upon the mort-

gagor's interest in the property, created subsequently to the recording of the mortgage.

N. Y. C. C., Sec. 1619.

SEC. 2930. A mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage, but after the execution of the mortgage the mortgageor may agree to such change of possession without a new consideration.

Mortgage does not entitle mortgagee to possession

N. Y. C. C., Sec. 1620.

SEC. 2931. A mortgagee may foreclose the right of redemption of the mortgageor, in the manner prescribed by the CODE OF CIVIL PROCEDURE.

Foreclosure.

N. Y. C. C., Sec. 1621.

SEC. 2932. No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security.

Waste.

N. Y. C. C., Sec. 1622.

## ARTICLE II.

### MORTGAGE OF REAL PROPERTY.

SECTION 2936. Mortgage of real property defined.

2937. How created.

2938. Form of mortgage.

2939. Mortgage not a personal obligation.

2940. By whom paid after property passes by succession or will.

2941. How acknowledged and recorded.

2942. Chaps. IV and V, on recording, etc., applied.

2943. Encumbrances protected by recording laws.

2944. Encumbrances presumed to be acquired in good faith, etc.

2945. Subsequently acquired title inures to mortgagee.

2946. What must be recorded as mortgage.

2947. Recording assignment of mortgage.

2948. Mortgage, how discharged.

2949. Same.

2950. Same.

2951. Penalty for not acknowledging satisfaction.

SEC. 2936. A mortgage of real property is called a real mortgage.

Mortgage of real property defined.

[New section.]

**How created.** SEC. 2937. A real mortgage can be created only by writing, with the formalities and requisites necessary in the case of the execution of a real instrument.

N. Y. C. C., Sec. 1623.

**NOTE.**—The words “under seal” struck out. This section can be consolidated with Sec. 2959 and placed in the preceding article.

**Form of mortgage.**

SEC. 2938. A real mortgage may be made in substantially the following form:

This mortgage, made the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, by A. B., of \_\_\_\_\_, mortgageor, to C. D., of \_\_\_\_\_, mortgagee, witnesseth:

[I.] That the mortgageor mortgages to the mortgagee [*here describe the property*], as security for the payment to him of \_\_\_\_\_ dollars, on [or before] the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_, with interest thereon [*or, as security for the payment of an obligation, describing it, etc.*]

[*If a power of sale is to be given, add.*] II. That in case of the non-payment of the principal sum, or of any part of the interest thereon, when due, the mortgagee may enter upon and sell the property above described, in the manner prescribed by the CIVIL CODE and the CODE OF CIVIL PROCEDURE of this State, and apply the proceeds of such sale to the satisfaction of the amount due under this mortgage, and of the expenses of the sale; the residue to be forthwith paid to the mortgageor.

[*If the interest clause is to be inserted, add.*] III. That if the interest upon the principal sum mentioned herein is not fully paid as it falls due, the entire principal shall become immediately due and payable, at the option of the mortgagee.

[*If the insurance clause is to be inserted, add.*] IV. That the mortgageor shall, at his own expense, keep the [buildings] on the said property insured against fire in a reputable insurance office, for the benefit of the mortgagee, to the extent of \_\_\_\_\_ dollars, until this mortgage is paid or otherwise extinguished.

Witnessed by:  
E\_\_\_\_\_ F\_\_\_\_\_.

Executed by:  
A\_\_\_\_\_ B\_\_\_\_\_.

**Mortgage not a personal obligation.**

SEC. 2939. A real mortgage does not bind the mortgageor personally to perform the act for the performance of which it is a security, unless there is an express covenant therein to that effect.

N. Y. C. C., Sec. 1624.

**NOTE.**—Strike out “real,” and put this section in preceding article.

SEC. 2940. When real property, subject to a mortgage, passes by succession or will, the successor or devisee must satisfy the mortgage out of his own property, without resorting to the executor or administrator of the mortgageor, unless there is an express direction in the will of the mortgageor, that the mortgage shall be otherwise paid.

N. Y. C. C., Sec. 1625.

By whom paid after property passes by succession or will.

SEC. 2941. A real mortgage may be acknowledged or proved, certified and recorded, in like manner with grants, except that they must be recorded in books kept for mortgages exclusively.

N. Y. C. C., Sec. 1626.

How acknowledged and recorded

SEC. 2942. For the purpose of determining the right to record, the effect of recording or non-recording, a mortgage is deemed a real instrument, and is governed by the chapters on *Recording Transfers of Real Property*, and *Unlawful Transfers*.

Chaps. IV and V, on recording, etc., applied.

SEC. 2943. Encumbrances protected by the recording laws are defined in Sec. 1114 of this Code.

Encumbrances protected by recording laws.

SEC. 2944. An encumbrance is prima facie presumed to be acquired in good faith, in like manner with a recorded instrument mentioned in Sec. 1206, but the encumbrancer must show, as against an unrecorded instrument, that the debt or obligation secured by the encumbrance was an actual bona fide debt or obligation, existing at the time of creating the encumbrance, and be subject to the rules mentioned in Secs. 1207 and 1208.

Encumbrances presumed to be acquired in good faith, etc.

[New section.]

SEC. 2945. Title acquired by the mortgageor, subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt, in like manner as if acquired before the execution. The priority of application of such subsequently acquired title to successive mortgagees is determined by the existing rules of priority when no title is subsequently acquired. This section applies to other encumbrances in like manner with mortgages.

Subsequently acquired title inures to mortgagee

[New section.]

NOTE.—See Sec. 1078 of this Code.

What must  
be recorded  
as mortgage.

SEC. 2946. Every grant of real property, or of any estate therein, which appears, by any other writing, to be intended as a mortgage, within the meaning of Chap. I of this Title, must be recorded as a mortgage; and if such grant and other writing explanatory of its true character are not recorded together, at the same time and place, the grantee can derive no benefit from such record.

N. Y. C. C., Sec. 1628.

Recording  
assignment  
of mortgage.

SEC. 2947. An assignment of a real mortgage may be recorded in like manner with a mortgage, but in a separate book. Such assignment cannot be recorded unless executed, acknowledged or proved, with the same formalities as grants of real property. When recorded, it operates as notice to all persons subsequently deriving title to the mortgage from the assignor.

N. Y. C. C., Sec. 1629.

Mortgage,  
how dis-  
charged.

SEC. 2948. A recorded real mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the Recorder, who shall certify the acknowledgment in form substantially as follows: "Signed and acknowledged before me, this — day of —, in the year —;" and he shall affix his official name thereto.

[New section.] Based on "Conveyances," Sec. 37.

Same.

SEC. 2949. A recorded real mortgage, if not discharged as provided in the preceding section, must be discharged upon the record, by the officer having custody thereof, on the presentation to him of a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged, or proved and certified, as prescribed by the chapter on *Recording Transfers*, stating that the mortgage has been paid, or otherwise satisfied and discharged.

N. Y. C. C., Sec. 1630; "Conveyances," Sec. 38.

Same.

SEC. 2950. A certificate of the discharge of a real mortgage, and the proof or acknowledgment thereof, must be recorded at length, and a reference made in the record, to the book and page where the mortgage is recorded, and in the minute of the discharge made upon the record.



of the mortgage, to the book and page where the discharge is recorded.

N. Y. C. C., Sec. 1631 ; "Conveyances," Sec. 39.

Sec. 2951. In satisfying a recorded real mortgage, each person who appears from the record to be an owner or part owner of the mortgage, or the personal representatives of such owner or part owner, must acknowledge satisfaction of such mortgage, as provided in this chapter, within seven days after demand therefor, from any person interested in the property or in any lien thereon; and if he neglects or refuses to make such acknowledgment within the time mentioned, he shall pay one hundred dollars to the party making the demand, and all damages occasioned by such neglect or refusal. The person making the demand must first tender to the acknowledging party his reasonable charges in that behalf.

Penalty for not acknowledging satisfaction.

"Conveyances," Sec. 40.

NOTE.—Put the penal part of this section in chapter on *Penal Damages*.

### ARTICLE III.

#### PERSONAL MORTGAGE.

SECTION 2956. Mortgage on personal property, a personal mortgage.

2957. Property subject to.

2958. Same.

2959. How created.

2960. Power of attorney to execute.

2961. Form of.

2962. Must be authenticated.

2963. Must be recorded.

2964. Other sections on recording made applicable.

2965. Recorded in different places.

2966. Time allowed for travel to Recorder's office.

2967. Property in transit exempt.

2968. Property of common carrier, where recorded.

2969. Property exempt from operation of the mortgage, when.

2970. Same.

2971. Same.

2972. Recorded mortgage, notice.

2973. Personal mortgage, how satisfied on record.

2974. How satisfied.

2975. Mortgagee may foreclose.

2976. Creditors of mortgageor, remedy.

2977. Creditors of mortgagee, remedy.

2978. Does not apply to ships.

Mortgage on  
personal  
property, a  
personal  
mortgage.  
Property  
subject to.

SEC. 2956. A mortgage of personal property is called a personal mortgage.

SEC. 2957. All personal property is the subject of mortgage, except as provided in Sec. 2978.

Same.

SEC. 2958. Growing crops, nursery trees and other anticipated products of land are personal property, within the meaning of this article.

[New section.]

Story Eq. Jur. Sec. 1021; Wilson vs. Wilson, 32 Barb., 328. There may be a mortgage of personal property not yet in being, if it is the anticipated product of property owned by the mortgageor (as where he mortgages all the produce of his farm during a given season), taking effect upon the property as soon as it comes into existence (Conderman vs. Smith, 41 Barb., 328). But the mere expectancy of an heir apparent cannot be mortgaged (Carlton vs. Leighton, 3 Meriv., 667). See Secs. 460 and 461, for a definition of what may be transferred.

NOTE.—In New York all personal property may be mortgaged—mortgage to be filed, not recorded; must be renewed every year. The two preceding sections propose to extend the law to all personal property. The following section is the existing law. One or the other will be finally omitted:

SEC. —. A personal mortgage may be made on the following property, to secure the payment of just indebtedness:

1. Upholstery and furniture used in hotels and public boarding houses.
2. Saw mill, grist mill and steamboat machinery.
3. Tools and machinery used by machinists, foundrymen and other mechanics.
4. Steam boilers, steam engines, locomotives, engines and the rolling stock of railroads.
5. Printing presses and other printing materials.
6. Instruments and chests of a surgeon, physician or dentist.
7. Libraries of all persons.
8. Machinery and apparatus for mining purposes.
9. Growing crops.

"Chattel Mortgages," Sec. 1. The last subdivision is from "Fraudulent Conveyances," Sec. 17.

This section may be substituted for the two preceding; the remaining sections can readily be adapted to it.

How created SEC. 2959. A personal mortgage can only be created by a written instrument, and with the same formalities required to create a mortgage on real property.

Power of attorney to execute. SEC. 2960. A power of attorney to execute a personal mortgage must be in writing, subscribed, acknowledged or proved, certified and recorded, in like manner as powers of attorney for grants of real property.

Form of. SEC. 2961. A personal mortgage may be made in substantially the following form:

This mortgage, made the — day of —, in the year —, by A. B., of —, by occupation a —, mortgageor, to C. D., of —, mortgagee, witnesseth:

[1] That the mortgageor mortgages to the mortgagee [here describe the property], as security for the payment to him of — dollars, on [or before] the — day of —, in the year —, with interest thereon [or, as security for the payment of a note or obligation, describing it, etc.] This mortgage is executed in good faith, and not to hinder, delay or defraud creditors.

[If a power of sale is to be given, add.] II. That in case of the non-payment of the principal sum, or of any part of the interest thereon, when due, the mortgagee may enter upon any place where the said property is situated, and sell the property above described, in the manner prescribed by the CIVIL CODE and the CODE OF CIVIL PROCEDURE of this State, and apply the proceeds of such sale to the satisfaction of the amount due under this mortgage, and of the expenses of the sale; the residue to be forthwith paid to the mortgageor.

[If the interest clause is to be inserted, add.] III. That, if the interest upon the principal sum mentioned herein is not fully paid as it falls due, the entire principal shall become immediately payable, at the option of the mortgagee

[If the insurance clause is to be inserted, add.] IV. That the mortgageor shall, at his own expense, keep the said property insured against [fire] in a reputable insurance office, for the benefit of the mortgagee, to the extent of — dollars, until this mortgage is paid or otherwise extinguished.

Witnessed by:

E— F—.

Executed by:

A— B—.

N. Y. C. C., "Schedule."

Sec. 2962. A personal mortgage, before it can be recorded, must be acknowledged, or proved, certified and recorded, in like manner with real mortgages.

Must be authenticated.

NOTE.—This takes the place of an affidavit. Ample penal sections must be prepared for the Penal Code, to supply a punishment for fraudulent mortgage equal to that for perjury. The change is made to give uniformity and similarity to real and personal mortgages.

Sec. 2963. A personal mortgage must be recorded in the office of the County Recorder of the county or counties where the property, or parts thereof, is respectively located or used, or in which it is removed. It must be recorded, also, in the county where the mortgageor re-

Must be recorded.

sides, if a resident of this State. A certified copy of a personal mortgage, once recorded, may be recorded in any other county.

[New section.]

Other sections on recording made applicable.

SEC. 2964. The provisions of Sec. 1218 are applicable to the recording of a personal mortgage.

[New section.]

Recorded in different places.

SEC. 2965. A single personal mortgage, embracing several things of such character or so situated that, by the provisions of this article, separate recording would be required in different places, is only valid in respect to the things and places as to which it is duly recorded.

N. Y. C. C., Sec. 1637.

Time allowed for travel to Recorder's office.

SEC. 2966. The mortgagee in a personal mortgage is allowed, from the date of the mortgage, one day for every twenty miles of the distance between his residence and the County Recorder's office where such mortgage ought by law to be recorded. During such time the mortgage shall have the same effect as if recorded.

[New section.] Based on "Chattel Mortgages," Sec. 7.

NOTE.—This section should either be omitted or extended to all real instruments and real mortgages.

Property in transit exempt.

SEC. 2967. Property *in transitu* from the possession of the mortgagee to the county of the residence of the mortgageor, or to a location for use, shall, during a reasonable time for such transportation, be considered as located in any county where it is recorded.

Stats. 1857, 347, Sec. 2.

Property of common carrier, where recorded.

SEC. 2968. A mortgage of property used in conducting the business of a common carrier must be recorded in the county where the principal office or place of business of such carrier is located; and such recording shall operate to protect the mortgage in all counties, as against creditors, subsequent purchasers and encumbrancers, to the same extent as if the mortgage was recorded in all counties.

[New section.]

Property exempt from operation of the mortgage, when

SEC. 2969. Except as provided in Secs. 2967 and 2968, personal property, mortgaged within the provisions of

this article, is exempt from the operation of the mortgage when voluntarily removed by the mortgageor from the county in which the mortgage is recorded, or when permitted to remain out of such county, when otherwise removed, after the expiration of a reasonable time for its return, unless the same is taken as a pledge, as provided in the next section.

[New section.]

SEC. 2970. If the mortgageor voluntarily removes the mortgaged property into a county wherein the mortgage is not recorded, or voluntarily permits it to remain there if removed by others, the mortgagee may take possession of the property and dispose of it as a pledge for the payment of the debt, though such debt is not due. Same.

[New section.]

SEC. 2971. A personal mortgage ceases to be valid, as against creditors of the mortgageor, and subsequent purchasers or encumbrancers in good faith, after the expiration of three months from the time the money is due, as shown by the mortgage, unless within such three months proceedings are commenced to foreclose the lien. Any further extension requires a new mortgage. Same.

[New section.]

SEC. 2972. The recording of a personal mortgage, in conformity to the provisions of this article, operates as notice thereof to all creditors, subsequent purchasers and encumbrancers. Recorded mortgage, notice.

N. Y. C. C., Sec. 1635.

SEC. 2973. A personal mortgage is void as against creditors of the mortgageor, and subsequent purchasers and encumbrancers of the property in good faith and for value, unless it is recorded, or accompanied by an immediate delivery and followed by an actual and continued change of possession. Personal mortgage, how satisfied on record.

N. Y. C. C., Sec. 1634; "Fraudulent Conveyances," Sec. 15.

SEC. 2974. A personal mortgage may be satisfied on the record in like manner as mortgages of real property. Secs. 2948, 2949, 2950, 2951, apply to personal mortgages. How satisfied.

[New section.]

Mortgagee  
may fore-  
close.

SEC. 2975. A mortgagee of personal property, when the debt for which it is given is due, may foreclose the mortgageor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed by the Title on *Pledge*, or by proceedings under the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 1633.

Creditors of  
mortgageor,  
remedy.

SEC. 2976. A creditor of a mortgageor of personal property, by a proper action in the District Court, may subject the interest of the mortgageor to the payment of debts due such creditor. In such cases the Court may decree the payment of the secured debt before maturity, issue injunctions, establish priority of liens and decree sales, in like manner as in other civil cases. In such case the burden is upon the mortgageor or mortgagee to show that the mortgage, and the debt secured by it, were created in good faith, for value, and not to hinder, delay or defraud creditors.

[New section.] NOTE.—This last clause is a hard rule, which, when stated in another form, is, that “the mortgage is presumed to be fraudulent, but the parties may show good faith.” This is better than the existing law, which makes it *conclusively* fraudulent and void.

Creditors of  
mortgagee,  
remedy.

SEC. 2977. A creditor of a mortgagee of personal property has remedies against the interest of the mortgagee in the mortgaged property and debt, as provided by the CODE OF CIVIL PROCEDURE.

[New section.]

Does not ap-  
ply to ships.

SEC. 2978. This article does not apply to any mortgage of a ship or part of a ship, which is required by Act of Congress to be filed or recorded in any other manner.

NOTE.—By Act of Congress of July 29th, 1850 (§ U. S. Stat. at L., 440), it was provided “that no bill of sale, mortgage, hypothecation or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person (other than the grantor or mortgageor, his heirs and devisees, and persons having actual notice thereof), unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the Collector of the Customs where such vessel is registered or enrolled.

## CHAPTER III.

## PLEDGE.

## Section 2986. Pledge, what.

- 2987. When contract is to be deemed a pledge.
- 2988. Delivery essential to validity of pledge.
- 2989. Increase of thing.
- 2990. Lienor may pledge property to extent of his lien.
- 2991. Real owner cannot defeat pledge of property transferred to apparent owner for purpose of pledge.
- 2992. Pledge lender, what.
- 2993. Pledge holder, what.
- 2994. When pledge lender may withdraw property pledged.
- 2995. Obligations of pledge holder.
- 2996. Pledge holder must enforce rights of pledgee.
- 2997. Obligation of pledgee and pledge holder, for reward.
- 2998. Gratuitous pledge holder.
- 2999. Debtor's misrepresentation of value of pledge.
- 3000. When pledgee may sell.
- 3001. When pledgee must demand performance.
- 3002. Notice of sale to pledgee.
- 3003. Waiver of notice of sale.
- 3004. Waiver of demand.
- 3005. Sale must be by auction.
- 3006. Pledgee's sale of securities.
- 3007. Sale on the demand of the pledgee.
- 3008. Surplus to be paid to pledgee.
- 3009. Same.
- 3010. Pledgee's purchase of property pledged.
- 3011. Pledgee may foreclose right of redemption.

Sec. 2986. Pledge is a deposit of personal property by way of security for the performance of another act. Pledge, what,

NORM.—Our statute on "Pawnbrokers" will be found, a little condensed, in the form of a note at the end of this chapter. It can be substituted, if thought best, for this, which is a copy from the New York Civil Code.

Sec 2987. Every contract by which the possession of personal property is transferred, as a security only, is to be deemed a pledge. When contract is to be deemed a pledge.

It is intended, by this section, to place every mortgage of personal property, accompanied by a change of possession, upon the same footing with a pledge. This is in accordance with the rule of the civil law, and will greatly simplify the law of this State in respect to pledges and mortgages (see Story Eq. Jur., Sec. 1006; Code Napoleon, 2071, 2117).

N. Y. C. C., Sec. 1648.

Delivery  
essential to  
validity of  
pledge.

SEC. 2988. The lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledge holder, as hereafter prescribed.

N. Y. C. C., Sec. 1649.

Increase of  
thing.

SEC. 2989. The increase of property pledged is pledged with the property.

N. Y. C. C., Sec. 1650.

Lienor may  
pledge prop-  
erty to ex-  
tent of his  
lien.

SEC. 2990. One who has a lien upon property may pledge it to the extent of his lien.

This power is not fully recognized by our existing law; but it is established in England, and seems just.

N. Y. C. C., Sec. 1651.

Real owner  
cannot de-  
feat pledge  
of property  
transferred  
to apparent  
owner for  
purpose of  
pledge.

SEC. 2991. One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value

This section is an extension of our present rule allowing a pledge by an agent intrusted with indicia of title to be sustained in favor of one who lends upon it without notice of the true owner's title.

N. Y. C. C., Sec. 1652.

Pledge lend-  
er, what.

SEC. 2992. Property may be pledged as security for the obligation of another person than the owner, and in so doing the owner has all the rights of a pledgor for himself, except as hereinafter stated.

N. Y. C. C., Sec. 1653.

Pledge hold-  
er, what.

SEC. 2993. A pledgor and pledgee may agree upon a third person with whom to deposit the property pledged; who, if he accepts the deposit, is called a pledge holder.

N. Y. C. C., Sec. 1654.

When pledge  
lender may  
withdraw  
property  
pledged.

SEC. 2994. One who pledges property as security for the obligation of another, cannot withdraw the property pledged otherwise than as a pledgor for himself might; and, if he receives from the debtor a consideration for the pledge, he cannot withdraw it without his consent.

N. Y. C. C., Sec. 1655.

Obligations  
of pledge  
holder.

SEC. 2995. A pledge holder for reward cannot exonerate himself from his undertaking; and a gratuitous



pledge holder can do so only by giving reasonable notice to the pledgeor and pledgee to appoint a new pledge holder, and, in case of their failure to agree, by depositing the property pledged with some impartial person, who will then be entitled to a reasonable compensation for his care of the same.

N. Y. C. C., Sec. 1656.

SEC. 2996. A pledge holder must enforce all the rights of the pledgee, unless authorized by him to waive them.

Pledge holder must enforce rights of pledgee.

N. Y. C. C., Sec. 1657.

SEC. 2997. A pledgee, or a pledge holder for reward, assumes the duties and liabilities of a depositary for reward.

Obligation of pledgee and pledge holder, for reward.

N. Y. C. C., Sec. 1658.

SEC. 2998. A gratuitous pledge holder assumes the duties and liabilities of a gratuitous depositary.

Gratuitous pledge holder.

N. Y. C. C., Sec. 1659.

SEC. 2999. Where a debtor has obtained credit, or an extension of time, by a fraudulent misrepresentation of the value of property pledged by or for him, the creditor may demand a further pledge to correspond with the value represented; and in default thereof may recover his debt immediately, though it be not actually due.

Debtor's misrepresentation of value of pledge.

N. Y. C. C., Sec. 1660.

SEC. 3000. When performance of the act for which a pledge is given is due, in whole or in part, the pledgee may collect what is due to him by a sale of property pledged, subject to the rules and exceptions hereinafter prescribed.

When pledgee may sell.

N. Y. C. C., Sec. 1661.

SEC. 3001. Before property pledged may be sold, and after performance of the act for which it is security is due, the pledgee must demand performance thereof from the debtor.

When pledgee must demand performance.

N. Y. C. C., Sec. 1662.

SEC. 3002. A pledgee must give actual notice to the pledgeor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgeor to attend.

Notice of sale to pledgeor.

N. Y. C. C., Sec. 1663.

Waiver of  
notice of  
sale.

SEC. 3003. Notice of sale may be waived by a pledgeor at any time; but is not waived by a mere waiver of demand of performance.

N. Y. C. C., Sec. 1664.

Waiver of  
demand.

SEC. 3004. A debtor or pledgeor waives a demand of performance as a condition precedent to a sale of the property pledged, by a positive refusal to perform, after performance is due; but cannot waive it in any other manner except by contract.

N. Y. C. C., Sec. 1665.

Sale must be  
by auction.

SEC. 3005. The sale by a pledgee, of property pledged, must be made by public auction, in the manner and upon the notice to the public usual at the place of sale, in respect to auction sales of similar property; and must be for the highest obtainable price.

It is of course to be understood that this section may be overruled by agreement of the parties.

N. Y. C. C., Sec. 1666.

Pledgee's  
sale of secu-  
rities.

SEC. 3006. A pledgee cannot sell any evidence of debt pledged to him, except the obligations of Governments, States or corporations; but he may collect the same when due.

Of course a different agreement may be made by the parties.

N. Y. C. C., Sec. 1667.

Sale on the  
demand of  
the pledgeor.

SEC. 3007. Whenever property pledged can be sold for a price sufficient to satisfy the claim of the pledgee, the pledgeor may require it to be sold, and its proceeds to be applied to such satisfaction, when due.

This provision is new, or, at least, it is very doubtful whether such a right now exists. But its justice is very clear (Story Bailm., Sec. 320). It is not proposed to extend the same privilege to mortgages, as they are used as permanent securities. A pledge should be used only as a transient security.

N. Y. C. C., Sec. 1668.

Surplus to  
be paid to  
pledgeor.

SEC. 3008. After a pledgee has lawfully sold property pledged, or otherwise collected its proceeds, he may deduct therefrom the amount due under the principal obligation, and the necessary expenses of sale and collection, and must pay the surplus to the pledgeor, on demand

N. Y. C. C., Sec. 1669.

SEC. 3009. When property pledged is sold before the claim of the pledgee is due, he may retain out of the proceeds all that can possibly become due under his claim, until it becomes due; with the proper rebate of interest. Same.

N. Y. C. C., Sec. 1670.

SEC. 3010. A pledgee, or pledge holder, cannot purchase the property pledged except by direct dealing with the pledgor. Pledgee's purchase of property pledged.

Story on Bailm., Sec. 319; see also *Dykens vs. Allen*, 7 Hill, 497, and the Title on *Trusts*. But (prior to Laws of 1857, Chap. 414, somewhat enlarging the powers of a special partner) it was held that a special partner of a firm with whom property is pledged is not incapacitated from purchasing it at a sale made by the firm. As he was prohibited from transacting any business on account of the partnership, and could not be employed as agent, attorney or otherwise, no duty devolved upon him in reference to the bailment. He could not aid or direct in the sale; and, hence, was not within the rule that one shall not be permitted to purchase who has a duty inconsistent with the character of purchaser (*Lewis vs. Graham*, 4 Abb. Pr., 106).

N. Y. C. C., Sec. 1671.

SEC. 3011. Instead of selling property pledged, as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale under the direction of a competent Court; and in that case may be authorized by the Court to purchase at the sale. Pledgee may foreclose right of redemption.

N. Y. C. C., Sec. 1672.

NOTE.—The following is our statute on "Pawnbrokers" (Stats. 1861, 184) :

SECTION 1. Every person carrying on the business of a pledgee, in this State, must keep a register, wherein must be entered, in the English language, the date, duration, amount, and rate of interest, of every loan made by him, an accurate account and description of the property pledged, and the name and residence of the pledgor, and, at the same time, deliver to the pledgor a written or printed memorandum signed by him, containing a copy of the entry, and must also keep an account of all sales made by him.

SEC. 2. The rate of interest which may be charged by any pledgee shall not exceed four per cent. per month, in advance, on all loans exceeding twenty dollars, which shall include all charges for discount, commissions, storage, brokerage, wastage, and all charges. The interest must not be compounded.

SEC. 3. Any pledgee who charges or receives any interest greater than four per cent. per month, or attempts to increase the interest by charging commissions, discount, brokerage, storage, wastage or other charge, or shall compound the interest, forfeits three times the value of the article pledged, or to be pledged, to be recovered by the owner or pledgor in a civil action.

SEC. 4. No pledgee must sell or dispose of any article pledged to him and unredeemed, until it has remained in

his possession six months after the last day of redemption and all such sales must be at public auction, upon notice of five days, published in some newspaper printed at the place where the sale takes place; and if no newspaper is there printed, then by posting notices in two public places, five days before the sale, giving the place where the articles will be sold, and a list of the articles, which sales must, in all cases, take place in the town or city where such articles are pledged.

SEC. 5. After deducting from the proceeds of any sale the amount of the loan, the interest then due, and four per cent. on the loan additional for the expense of the sale, the pledgee must pay the balance to the person entitled to redeem the property if no sale had been made, and if not so paid on demand, three times the amount thereof shall be forfeited, to be recovered by the owner or pledgee in a civil action.

SEC. 6. Every pledgee must exhibit his register, and all articles received by him in pledge, and his account of sales, to any Sheriff, Constable or police officer, possessing the necessary writ or warrant to search for personal property.

See Secs. 338 to 343, inclusive, Penal Code, and compare with them.

## CHAPTER IV.

### BOTTOMRY.

#### SECTION 3017. Bottomry, what.

3018. Owner of ship may hypothecate.

3019. When master may hypothecate ship.

3020. Same.

3021. When master may hypothecate freight money.

3022. Rate of interest.

3023. Rights of lender, when no necessity for bottomry existed.

3024. Stipulation for personal liability void.

3025. When money loaned is to be repaid.

3026. When bottomry loan becomes due.

3027. Bottomry lien, how lost.

3028. Preference of bottomry lien over other liens.

3029. Priority of bottomry liens.

Bottomry,  
what.

SEC. 3017. Bottomry is a contract by which a ship or its freightage is hypothecated as security for a loan, which is to be repaid only in case the ship survives a particular risk, voyage or period.

N. Y. C. C., Sec. 1673.

Owner of  
ship may  
hypothecate.

SEC. 3018. The owner of a ship may hypothecate it or its freightage, upon bottomry, for any lawful purpose, and at any time and place.

N. Y. C. C., Sec. 1674.

Sec. 3019. The master of a ship may hypothecate it upon bottomry, only for the purpose of procuring repairs or supplies which are necessary for accomplishing the objects of the voyage, or for securing the safety of the ship.

When master may hypothecate ship.

N. Y. C. C., Sec. 1675.

Sec. 3020. The master of a ship can hypothecate it upon bottomry, only when he cannot otherwise relieve the necessities of the ship, and is unable to reach adequate funds of the owner, or to obtain any upon the personal credit of the owner, and when previous communication with him is precluded by the urgent necessity of the case.

Same.

N. Y. C. C., Sec. 1676.

Sec. 3021. The master of a ship may hypothecate freightage upon bottomry, under the same circumstances as those which authorize an hypothecation of the ship by him.

When master may hypothecate freight money.

N. Y. C. C., Sec. 1677.

Sec. 3022. Upon a contract of bottomry, the parties may lawfully stipulate for a rate of interest higher than that allowed by the law upon other contracts. But a competent Court may reduce the rate stipulated, when it appears unjustifiable and exorbitant.

Rate of interest.

N. Y. C. C., Sec. 1678.

Sec. 3023. A lender upon a contract of bottomry, made by the master of a ship, as such, may enforce the contract, though the circumstances necessary to authorize the master to hypothecate the ship did not in fact exist, if, after due diligence and inquiry, the lender had reasonable grounds to believe, and did in good faith believe, in the existence of such circumstances.

Rights of lender, when no necessity for bottomry existed.

N. Y. C. C., Sec. 1679.

Sec. 3024. A stipulation in a contract of bottomry, imposing any liability for the loan independent of the maritime risks, is void.

Stipulation for personal liability void

N. Y. C. C., Sec. 1680.

Sec. 3025. In case of a total loss of the thing hypothecated, from a risk to which the loan was subject, the lender upon bottomry can recover nothing; in case of a

When money loaned is to be repaid.

partial loss, he can recover only to the extent of the net value to the owner of the part saved.

N. Y. C. C., Sec. 1681.

When bottomry loan becomes due.

SEC. 3026. Unless it is otherwise expressly agreed, a bottomry loan becomes due immediately upon the termination of the risk, although a term of credit is specified in the contract.

N. Y. C. C., Sec. 1682.

Bottomry lien, how lost.

SEC. 3027. A bottomry lien is independent of possession, and is lost by omission to enforce it within a reasonable time.

N. Y. C. C., Sec. 1683.

Preference of bottomry liens over other liens.

SEC. 3028. A bottomry lien, if created out of a real or apparent necessity, in good faith, is preferred to every other lien or claim upon the same thing, excepting only a lien for seamen's wages, a subsequent lien of materialmen for supplies or repairs indispensable to the safety of the ship, and a subsequent lien for salvage.

N. Y. C. C., Sec. 1684.

Priority of bottomry liens.

SEC. 3029. Of two or more bottomry liens on the same subject, the latter in date has preference, if created out of necessity.

N. Y. C. C., Sec. 1685.

## CHAPTER V.

### RESPONDENTIA

- SECTION 3036. Respondentia, what.
- 3037. Respondentia by owner.
- 3038. Respondentia by master.
- 3039. Rate of interest.
- 3040. Obligations of ship owner.

Respondentia, what.

SEC. 3036. Respondentia is a contract by which a cargo, or some part thereof, is hypothecated as security for a loan, the repayment of which is dependent on maritime risks.

N. Y. C. C., Sec. 1686.

SEC. 3037. The owner of cargo may hypothecate it upon respondentia, at any time and place, and for any lawful purpose.

Responden-  
tia by owner.

N. Y. C. C., Sec. 1687.

SEC. 3038. The master of a ship may hypothecate its cargo upon respondentia, only in a case in which he would be authorized to hypothecate the ship and freightage, but is unable to borrow sufficient money thereon for repairs or supplies which are necessary for the successful accomplishment of the voyage; and he cannot do so, even in such case, if there is no reasonable prospect of benefiting the cargo thereby.

Responden-  
tia by master

N. Y. C. C., Sec. 1688.

SEC. 3039. The provisions of Secs. 3022 to 3029 apply equally to loans on respondentia.

Rate of  
interest.

N. Y. C. C., Sec. 1689.

SEC. 3040. The owner of a ship is bound to repay to the owner of its cargo all which the latter is compelled to pay, under a contract of respondentia made by the master, in order to discharge its lien.

Obligations  
of ship  
owner.

N. Y. C. C., Sec. 1690.

## CHAPTER VI.

### OTHER LIENS.

SECTION 3046. Lien of seller of real property.

3047. When transfer of contract waves lien.

3048. Extent of seller's lien.

3049. Lien of seller of personal property.

3050. Purchaser's lien on real property.

3051. Lien for services.

3052. Liens on personal property.

3053. Innkeeper, definition of.

3054. Innkeeper's lien, what it extends to, generally.

3055. Not measured by propriety of supplies.

3056. Goods must be delivered and received in character of guest and innkeeper.

3057. Extends only to goods which innkeeper is bound to receive.

3058. Extends to stolen property.

3059. Extends to horses.

3060. Boarding-house keeper included as innkeeper.

3061. Lien of factor.

- SECTION 3062. Banker's lien.  
 3063. Shipmaster's lien.  
 3064. Seamen's lien.  
 3065. Officer's lien.  
 3066. Attorneys' lien.  
 3067. Judgment lien.  
 3068. Mechanic's lien.  
 3069. Lien on ships.  
 3070. Enforcement of lien.

Lien of seller of real property.

SEC. 3046. One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

N. Y. C. C., Sec. 1691.

When transfer of contract waives lien.

SEC. 3047. Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract, by the seller, waives his lien to the extent of the sum payable under the contract.

*Hallock vs. Smith*, 3 Barb., 267. A transfer in trust to pay debts, and return the surplus, does not waive the lien. (Id.)

N. Y. C. C., Sec. 1692.

Extent of seller's lien.

SEC. 3048. The liens defined in Secs. 3046 and 3050 are valid against every one claiming under the debtor, except a purchaser or encumbrancer in good faith and for value.

*Hallock vs. Smith*, 3 Barb., 267; *Champion vs. Brown*, 6 Johns. Ch., 598.

*Warren vs. Fenn*, 28 Barb., 333; *Burlingame vs. Robins*, 21 id., 327; *Shirley vs. Congress*, etc.; *Refinery*, 2 Edw., 505. But compare *Bayley vs. Greenleaf*, 7 Wheat., 46.

N. Y. C. C., Sec. 1693.

Lien of seller of personal property.

SEC. 3049. One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price.

N. Y. C. C., Sec. 1694.

Purchaser's lien on real property.

SEC. 3050. One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid



as he may be entitled to recover back, in case of a failure of consideration.

N. Y. C. C., Sec. 1695.

**SEC. 3051.** Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof by labor or skill employed for the protection, improvement, safe keeping or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service.

Lien for services.

N. Y. C. C., Sec. 1696.

**SEC. 3052.** A person who makes, alters or repairs any article of personal property, at the request of the owner or legal possessor of the property, has a lien on the same for his reasonable charges for work done and materials furnished, and may retain possession of the same until the charges are paid. If not paid within two months after the work is done, the person may proceed to sell the property at public auction, by giving ten days public notice of the sale by advertising in some newspaper published in the county in which the work was done; or, if there be no newspaper published in the county, then by posting up notices of the sale in three of the most public places in the town where the work was done, for ten days previous to the sale. The proceeds of the sale must be applied to the discharge of the lien and the cost of keeping and selling the property; the remainder, if any, must be paid over to the owner thereof.

Liens on personal property.

Stats. 1863, 589, Sec. 15 (Act for securing liens of mechanics and others).

**SEC. 3053.** An innkeeper is the keeper of a house of public entertainment, and who provides accommodation for travellers and sojourners.

Innkeeper, definition of.

[New section.]

**SEC. 3054.** An innkeeper has a specific lien upon the goods brought to the inn by his guest, for the price of the lodgings and supplies furnished to him, subject to rules prescribed in the next five sections.

Innkeeper's lien, what it extends to, generally.

**SEC. 3055.** It is not measured by the supposed necessity or propriety of the supplies for the price of which it

Not measured by propriety of supplies.

arises, if the guest is possessed of his reason and is not an infant.

Goods must be delivered and received in character of guest and innkeeper.

SEC. 3056. It arises only when the goods come to the hands of the innkeeper in that character from a person who is then his guest; and will not arise by reason that the person who brings the goods afterwards becomes a guest, irrespective of the contract under which the goods were received.

Extends only to goods which innkeeper is bound to receive.

SEC. 3057. It extends to such only of the goods brought by the guest as the innkeeper, in the performance of his duty to the public, is bound to receive, but it does not extend to the clothes on the person.

Extends to stolen property.

SEC. 3058. It extends to property brought by, but not belonging to the guest, though it be stolen, if the innkeeper at the time of the deposit had no notice of the unlawful possession, or of the title of the real owner.

Extends to horses.

SEC. 3059. It extends to horses brought by the owner as a guest to the inn, though they be occasionally removed, if the removal be with an intention to return them, and no new contract is established.

Boarding-house keeper included as innkeeper.

SEC. 3060. • A boarding-house keeper is an innkeeper, and his lien an innkeeper's lien, within the meaning of the preceding sections.

[New section.]

NOTE.—There is no small subject upon which a distinct declaration of the law will be more useful than that upon the *rights of innkeepers*. The necessity of acting promptly; the danger of illegally delaying or annoying the travelling community, and the danger of losing just dues, makes it necessary that every traveller and innkeeper should be familiar with the law governing the relation.

SECS. 3054 to 3059, inclusive, with but slight changes, have been taken from a *specimen article* on the subject, prepared by R. W. Fisher, author of the work on *Mortgages*, and submitted to the Lord Chancellor with a letter on the subject of the codification of the Common Law. See SECS. 1859 and 1860 of this Code.

Lien of factor.

SEC. 3061. A factor has a general lien, dependent on possession, for all that is due to him as such, upon all articles of commercial value that are intrusted to him by the same principal.

N. Y. C. C., Sec. 1697.

SEC. 3062. A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business.

Banker's  
lien.

N. Y. C. C., Sec. 1698.

SEC. 3063. The master of a ship has a general lien, independent of possession, upon the ship and freightage, for advances necessarily made or liabilities necessarily incurred by him for the benefit of the ship, but has no lien for his wages.

Shipmas-  
ter's lien.

N. Y. C. C., Sec. 1699.

SEC. 3064. The mate and seamen of a ship have a general lien, independent of possession, upon the ship and freightage, for their wages, which is superior to every other lien.

Seamen's  
lien.

N. Y. C. C., Sec. 1700.

SEC. 3065. An officer who levies an attachment or execution upon personal property acquires a special lien, dependent on possession, upon such property, which authorizes him to hold it until the process is discharged or satisfied, or a judicial sale of the property is had.

Officer's lien.

N. Y. C. C., Sec. 1701.

SEC. 3066. An attorney at law has a lien, which is defined and regulated by the CODE OF CIVIL PROCEDURE.

Attorneys'  
lien.

N. Y. C. C., Sec. 1702.

NOTE.—See Sec. 520 (N. Y. C. C.) of the Code, reported complete.

SEC. 3067. The lien of a judgment is regulated by the CODE OF CIVIL PROCEDURE.

Judgment  
lien.

N. Y. C. C., Sec. 1703.

SEC. 3068. The liens of mechanics, for materials and services upon real property, are regulated by the CODE OF CIVIL PROCEDURE.

Mechanic's  
lien

N. Y. C. C., Sec. 1704.

NOTE.—Nearly the whole chapter on *Mechanics' Liens*, in Code of Civil Procedure, commencing with Sec. 1183, ought to be re-examined and transferred to this Code.

Lien on  
ships.

SEC. 3069. Debts amounting to at least fifty dollars, contracted for the benefit of ships, are liens in the cases provided by the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 1705.

NOTE.—The reference is to the New York Code of Civil Procedure, as reported complete.

Enforce-  
ment of lien.

SEC. 3070. The mode of proceeding by a creditor to enforce a lien within this State is regulated by the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 1706.

NOTE.—New York Code, as reported complete.

## CHAPTER VII.

### STOPPAGE IN TRANSIT.

SECTION 3076. When consignor may stop goods.

3077. What is insolvency of consignee.

3078. Transit, when ended.

3079. Stoppage, how effected.

3080. Effect of stoppage.

When con-  
signor may  
stop goods.

SEC. 3076. A seller or consignor of property, whose claim for its price or proceeds has not been extinguished, may, upon the insolvency of the buyer or consignee becoming known to him after parting with the property, stop it while on its transit to the buyer or consignee, and resume possession thereof.

N. Y. C. C., Sec. 1707.

What is  
insolvency  
of consignee.

SEC. 3077. A person is insolvent, within the meaning of the last section, when he ceases to pay his debts in the manner usual with persons of his business, or when he declares his inability or unwillingness to do so.

N. Y. C. C., Sec. 1708.

Transit,  
when ended.

SEC. 3078. The transit of property is at an end when it comes into the possession of the consignee, or into that of his agent, unless such agent is employed merely to forward the property to the consignee.

N. Y. C. C., Sec. 1709.

SEC. 3079. Stoppage in transit can be effected only by notice to the carrier or depositary of the property, or by taking actual possession thereof.

Stoppage,  
how effected.

N. Y. C. C., Sec. 1710.

SEC. 3080. Stoppage in transit does not, of itself, rescind a sale, but is a means of enforcing the lien of the seller.

Effect of  
stoppage.

N. Y. C. C., Sec. 1711.

## TITLE XV.

### NEGOTIABLE INSTRUMENTS.

#### CHAPTER I. NEGOTIABLE INSTRUMENTS IN GENERAL.

##### II. BILLS OF EXCHANGE.

##### III. PROMISSORY NOTES.

##### IV. CHECKS.

##### V. BANK NOTES AND CERTIFICATES OF DEPOSIT.

NOTE.—The word “negotiable” has been so long used in its application to commercial paper, that the Commissioners have not thought themselves at liberty to propose in the text a substitute for it. They would have preferred the word “circulating,” as more precise and expressive, and if they had not felt bound by the present usage, they would have designated the instruments mentioned in this Title as “Circulating Instruments.”

#### CHAPTER I.

##### NEGOTIABLE INSTRUMENTS IN GENERAL.

##### ARTICLE I. GENERAL DEFINITIONS.

##### II. INTERPRETATION.

##### III. INDORSEMENT.

##### IV. PRESENTMENT FOR PAYMENT.

##### V. DISHONOR.

##### VI. EXCUSE OF PRESENTMENT AND NOTICE.

##### VII. EXTINCTION.

#### ARTICLE I.

##### GENERAL DEFINITIONS.

SECTION 3086. To what instruments this Title is applicable.

3087. Negotiable instrument, what.

SECTION 3088. Must be for unconditional payment of money.

3089. Payee.

3090. Instrument may be in alternative.

3091. Date, etc.

3092. May contain a pledge, etc.

3093. What it must not contain.

3094. Date.

3095. Different classes of negotiable instruments.

To what  
instruments  
this Title is  
applicable.

SEC. 3086. The provisions of this Title apply only to negotiable instruments, as defined in this article.

N. Y. C. C., Sec. 1712.

Negotiable  
instrument,  
what.

SEC. 3087. A negotiable instrument is a written promise or request for the payment of a certain sum of money [to a person, or] to order or bearer, in conformity to the provisions of this article.

N. Y. C. C., Sec. 1713.

NOTE.—Words in brackets, “to a person, or,” inserted on authority of Sec. 1, “Bills of Exchange and Promissory Notes” (Hittell).

Must be for  
uncondition-  
al payment  
of money.

SEC. 3088. A negotiable instrument must be made payable in money only, and without any condition not certain of fulfilment.

N. Y. C. C., Sec. 1714.

Payee.

SEC. 3089. The person to whose order a negotiable instrument is made payable must be ascertainable at the time the instrument is made.

N. Y. C. C., Sec. 1715.

Instrument  
may be in  
alternative.

SEC. 3090. A negotiable instrument may give to the payee an option between the payment of the sum specified therein and the performance of another act; but as to the latter, the instrument is not within the provisions of this Title.

N. Y. C. C., Sec. 1716.

Date, etc.

SEC. 3091. A negotiable instrument may be with or without date, and with or without designation of the time or place of payment.

N. Y. C. C., Sec. 1717.

NOTE.—The words “with or without seal” struck out as seals are abolished by this Code.

May contain  
a pledge,  
etc.

SEC. 3092. A negotiable instrument may contain a pledge of collateral security, with authority to dispose thereof.

N. Y. C. C., Sec. 1718.

SEC. 3093. A negotiable instrument must not contain any other contract than such as is specified in this article. What it must not contain.

An obligation to pay money and to do anything in addition, is not negotiable (Austin vs. Burns, 16 Barb., 643; Martin vs. Chauntry, 2 Str., 1271). It has been said that an instrument cannot be made negotiable by calling it so on its face (Carruth vs. Walker, 8 Cal., 252). But it may be worthy of consideration whether parties should not be allowed by express words to bring any contract within the rules of negotiable paper.

N. Y. C. C., Sec. 1719.

SEC. 3094. Any date may be inserted by the maker of a negotiable instrument, whether past, present or future, and the instrument is not invalidated by his death or incapacity at the time of the nominal date. Date.

N. Y. C. C., Sec. 1720.

SEC. 3095. There are six classes of negotiable instruments, namely: Different classes of negotiable instruments.

1. Bills of exchange.
2. Promissory notes.
3. Bank notes.
4. Checks.
5. Bonds.
6. Certificates of deposit.

N. Y. C. C., Sec. 1721.

## ARTICLE II.

### INTERPRETATION OF NEGOTIABLE INSTRUMENTS.

SECTION 3099. Time and place of payment.

3100. Place of payment not specified.

3101. Instruments payable to a person or his order, how construed.

3102. Undorsed note, when negotiable.

3103. Fictitious payee.

3104. Presumption of consideration.

SEC. 3099. A negotiable instrument which does not specify the time of payment, is payable immediately. Time and place of payment.

N. Y. C. C., Sec. 1722.

SEC. 3100. A negotiable instrument which does not specify a place of payment, is payable wherever it is held at its maturity. Place of payment not specified.

N. Y. C. C., Sec. 1723.

SEC. 3101. An instrument, otherwise negotiable in form, payable to a person named, or "to his order," or Instruments payable to a person or his order, how construed.

"to bearer," or words equivalent thereto, is in the two former cases payable to the written order of such person, and in the latter case, payable to the bearer.

N. Y. C. C., Sec. 1724.

Unindorsed  
note, when  
negotiable.

SEC. 3102. A negotiable instrument, made payable to the order of the maker, or of a fictitious person, if issued by the maker for a valid consideration, without indorsement, has the same effect against him and all other persons having notice of the facts, as if payable to the bearer.

N. Y. C. C., Sec. 1725.

Fictitious  
payee.

SEC. 3103. A negotiable instrument, made payable to the order of a person obviously fictitious, is payable to the bearer.

N. Y. C. C., Sec. 1726.

Presumption  
of considera-  
tion.

SEC. 3104. The signature of every drawer, acceptor and indorser of a negotiable instrument, is presumed to have been made for a valuable consideration, before the maturity of the instrument, and in the ordinary course of business.

N. Y. C. C., Sec. 1727.

### ARTICLE III.

#### INDORSEMENT.

##### SECTION 3108. Indorsement, what.

3109. Agreement to indorse.

3110. When may be made on separate paper.

3111. Kinds of indorsement.

3112. General indorsement, what.

3113. Special indorsement, what.

3114. General indorsement, how made special.

3115. Destruction of negotiability by indorser.

3116. Implied warranty of indorser.

3117. Indorser, when liable to payee.

3118. Indorsement without recourse.

3119. Same.

3120. Indorsee privy to contract.

3121. Indorser has rights of guarantor.

3122. Rights of accommodation indorser.

3123. Effect of want of consideration.

3124. Indorsee in due course, what.

3125. Rights of indorsee in due course.

3126. Instrument left blank.



SEC. 3108. One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it, with his name thereon, to another person, is called an indorser, and his act is called indorsement.

Indorsement, what.

N. Y. C. C., Sec. 1728.

SEC. 3109. One who agrees to indorse a negotiable instrument is bound to write his signature upon the back of the instrument, if there is sufficient space thereon for that purpose.

Agreement to indorse.

This provision is new. Though an indorsement upon the face of the instrument is valid (*Young vs. Glover*, 3 Jur. [N. S.], 637), it is unusual, and would excite suspicion. A creditor, who agrees to accept an indorsed note in satisfaction, ought not to be required to accept such an indorsement.

N. Y. C. C., Sec. 1729.

SEC. 3110. When there is not room for a signature upon the back of a negotiable instrument, a signature equivalent to an indorsement thereof may be made upon a paper annexed thereto.

When may be made on separate paper.

N. Y. C. C., Sec. 1730.

SEC. 3111. An indorsement may be general or special.

Kinds of indorsement.

N. Y. C. C., Sec. 1731.

SEC. 3112. A general indorsement is one by which no indorsee is named.

General indorsement, what.

N. Y. C. C., Sec. 1732.

SEC. 3113. A special indorsement specifies the indorsee.

Special indorsement, what.

N. Y. C. C., Sec. 1733.

SEC. 3114. A negotiable instrument bearing a general indorsement cannot be afterwards specially indorsed; but any lawful holder may turn a general indorsement into a special one, by writing above it a direction for payment to a particular person.

General indorsement, how made special.

N. Y. C. C., Sec. 1734.

SEC. 3115. A special indorsement may, by express words for that purpose, but not otherwise, be so made as to render the instrument not negotiable.

Destruction of negotiability by indorser.

N. Y. C. C., Sec. 1735.

SEC. 3116. Every indorser of a negotiable instrument warrants to every subsequent holder thereof, who is not liable thereon to him—

Implied warranty of indorser.

1. That it is in all respects what it purports to be.
2. That he has a good title to it.
3. That the signatures of all prior parties are binding upon them.

4. That if the instrument is dishonored, the indorser will, upon notice thereof duly given to him, or without notice, where it is excused by law, pay so much of the same as the holder paid therefor, with interest; unless exonerated under the provisions of Secs. 3189, 3248 or 3255.

N. Y. C. C., Sec. 1736.

Indorser,  
when liable  
to payee.

SEC. 3117 One who indorses a negotiable instrument before it is delivered to the payee, is liable to the payee thereon, as an indorser.

This is the substance of the decision in *Moore vs. Cross*, 19 N. Y., 227. But previous cases have so complicated the question that it is necessary to clear up the confusion by a positive rule. It has long been maintained that an indorser, before delivery to the payee, does not mean to be responsible to him, and though, this doctrine is now overruled, yet the decision is put upon grounds that are needlessly technical.

N. Y. C. C., Sec. 1737.

Indorsement  
without  
recourse.

SEC. 3118. An indorser may qualify his indorsement with the words, "without recourse," or equivalent words; and upon such indorsement, he is responsible only to the same extent as in the case of a transfer without indorsement.

N. Y. C. C., Sec. 1738.

Same.

SEC. 3119. Except as otherwise prescribed by the last section, an indorsement without recourse has the same effect as any other indorsement.

N. Y. C. C., Sec. 1739.

Indorsee  
privity to  
contract.

SEC. 3120. An indorsee of a negotiable instrument has the same rights against every prior party thereto, that he would have had if the contract had been made directly between them in the first instance.

See *Griswold vs. Haven*, 25 N. Y., 595; *Polhill vs. Walter*, 3 B. & Ad., 114. This principle is one of great importance, particularly with reference to representations contained in commercial paper, which are deemed to be made directly to every indorsee.

N. Y. C. C., Sec. 1740.

Indorser has  
rights of  
guarantor.

SEC. 3121. An indorser has all the rights of a guarantor, as defined by the chapter on *Guaranty in General*, and is exonerated from liability in like manner.

Thus an extension of time granted to the principal debtor, discharges an indorser (*Platt vs. Stark*, 2 Hilt., 399; *Kelty vs. Jenkins*, 1 id., 73; *Wood vs. Jefferson Co. Bank*, 9 Cow., 194; *Hubbly vs. Brown*, 16 Johns., 70; *Myers vs. Welles*, 5 Hill, 463; *Dundas vs. Sterling*, 5 Penn. St., 73; *Sargent vs. Mason*, 6 Mass., 85; *Moss vs. Hall*, 5 Exch., 46), and a release of an indorser discharges subsequent indorsers (*Newcomb vs. Raynor*, 21 Wend., 108).

An indorser in the ordinary course of business has not the rights of a surety (*Pitts vs. Congdon*, 2 N. Y., 352; *Hurd vs. Little*, 12 Mass., 503; see *Pring vs. Clarkson*, 1 B. & C., 14).

N. Y. C. C., Sec. 1741.

Sec. 3122. One who indorses a negotiable instrument, at the request and for the accommodation of another party to the instrument, has all the rights of a surety, as defined by the chapter on *Suretyship*, and is exonerated in like manner, in respect to every one having notice of the facts, except that he is not entitled to contribution from subsequent indorsers.

Rights of accommodation indorser

N. Y. C. C., Sec. 1742.

Sec. 3123. The want of consideration for the undertaking of a maker, acceptor or indorser of a negotiable instrument, does not exonerate him from liability thereon to an indorsee in good faith for a consideration.

Effect of want of consideration.

N. Y. C. C., Sec. 1743.

Sec. 3124. An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer.

Indorsee in due course, what.

N. Y. C. C., Sec. 1744.

Sec. 3125. An indorsee of a negotiable instrument, in due course, acquires an absolute title thereto, so that it is valid in his hands, notwithstanding any provision of law making it generally void or voidable, and notwithstanding any defect in the title of the person from whom he acquired it.

Rights of indorsee in due course.

N. Y. C. C., Sec. 1745.

NOTE.—Sec. 368, Code of Civil Procedure, must be reconstructed to harmonize with this subject; also with Sec. 1459 of this Code. See, also, *Vinton vs. Crowe*, 4 Cal., 309.

Instrument  
left blank.

SEC. 3126. One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form.

N. Y. C. C., Sec. 1746.

#### ARTICLE IV.

##### PRESENTMENT FOR PAYMENT.

SECTION 3130. Effect of want of demand on principal debtor.

3131. Presentment, how made.

3132. Apparent maturity, when.

3133. Presumptive dishonor of bill, payable after sight.

3134. Apparent maturity of bill, payable at sight.

3136. Apparent maturity of note.

3136. Same.

3137. Surrender of instrument, when a condition of payment.

Effect of  
want of de-  
mand on  
principal  
debtor.

SEC. 3130. It is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order to charge him; but if the instrument is by its terms payable at a specified place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to an offer of payment upon his part.

N. Y. C. C., Sec. 1747.

Present-  
ment, how  
made.

SEC. 3131. Presentment of a negotiable instrument for payment, when necessary, must be made as follows, as nearly as by reasonable diligence it is practicable:

1. The instrument must be presented by the holder.

2. The instrument must be presented to the principal debtor, if he can be found at the place where presentment should be made; and if not, then it must be presented to some other person of discretion, if one can be found there; and if not, then it must be presented to a Notary Public within the State.

3. An instrument which specifies a place for its payment must be presented there; and if the place specified includes more than one house, then at the place of residence or business of the principal debtor, if it can be found therein.

4. An instrument which does not specify a place for its payment must be presented at the place of residence or business of the principal debtor, or wherever he may be found, at the option of the presentor; and,

5. The instrument must be presented upon the day of its apparent maturity, or, if it is payable on demand, at any time before its apparent maturity, within reasonable hours, and, if it is payable at a banking house, within the usual banking hours of the vicinity; but, by the consent of the person to whom it should be presented, it may be presented at any hour of the day.

N. Y. C. C., Sec. 1748.

Sec. 3132. The apparent maturity of a negotiable instrument, payable at a particular time, is the day on which, by its terms, it becomes due; or, when that is a holiday, the next business day.

Apparent  
maturity,  
when.

*Salter vs. Burt*, 20 Wend., 205; see *Campbell vs. International Assurance Company*, 4 Bosw., 298. If the recommendation of the Commissioners in regard to days of grace is not adopted (see Sec. 1781), it will be necessary to add to this section: "The usual days of grace are to be added."

N. Y. C. C., Sec. 1749.

Sec. 3133. A bill of exchange, payable at a certain time after sight, which is not accepted within ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance, is presumed to have been dishonored.

Presumptive  
dishonor of  
bill, payable  
after sight.

It is very desirable that the term at the end of which a bill may be presumed to be dishonored should be fixed. The decisions are conflicting and unsatisfactory. The Commissioners have simply suggested periods which seem reasonable, but do not attach any importance to the particular terms proposed.

N. Y. C. C., Sec. 1750.

Sec. 3134. The apparent maturity of a bill of exchange, payable at sight or on demand, is—

Apparent  
maturity of  
bill, payable  
at sight.

1. If it bears interest, one year after its date; or,
2. If it does not bear interest, ten days after its date, in addition to the time which would suffice, with ordinary diligence, to forward it for acceptance.

N. Y. C. C., Sec. 1751.

Sec. 3135. The apparent maturity of a promissory note, payable at sight or on demand, is—

Apparent  
maturity  
of note.

1. If it bears interest, one year after its date; or,
2. If it does not bear interest, six months after its date.

It is doubtful whether a demand note bearing interest has any "apparent maturity," unless it is known to be dishonored (see *Merritt vs. Todd*, 23 N. Y., 28; *Brooks vs. Mitchell*, 9 M. & W., 15; *Wethey vs. Andrews*, 3 Hill, 582; compare *Sice vs. Cunningham*, 1 Cow., 397; *Loose vs. Dunkin*, 7 Johns., 70).

N. Y. C. C., Sec. 1752.

Same.

SEC. 3136. Where a promissory note is payable at a certain time after sight or demand, such time is to be added to the periods mentioned in the last section.

N. Y. C. C., Sec. 1753.

Surrender of instrument, when a condition of payment.

SEC. 3137. A party to a negotiable instrument may require, as a condition concurrent to its payment by him—

1. That the instrument be surrendered to him, unless it is lost or destroyed, or the holder has other claims upon it; or,

2. If the holder has a right to retain the instrument, and does retain it, then that a receipt for the amount paid, or an exoneration of the party paying, be written thereon; or,

3. If the instrument is lost, then that the holder give to him a bond, executed by himself and two sufficient sureties, to indemnify him against any lawful claim thereon; or,

4. If the instrument is destroyed, then that proof of its destruction be given to him.

N. Y. C. C., Sec. 1754.

## ARTICLE V.

### DISHONOR OF NEGOTIABLE INSTRUMENTS.

SECTION 3141. Dishonor, what.

3142. Notice, by whom given.

3143. Form of notice.

3144. Notice, how served.

3145. Notice, how served after indorser's death.

3146. Notice given in ignorance of death, valid.

3147. Notice, when to be given.

3148. Notice of dishonor, when to be mailed.

3149. Notice, how given by agent.

3150. Additional time for notice by indorser.

3151. Effect of notice of dishonor.

SEC. 3141. A negotiable instrument is dishonored, when it is either not paid, or not accepted, according to its tenor, on presentment for the purpose, or without presentment, where that is excused.

Dishonor,  
what.

N. Y. C. C., Sec. 1755.

SEC. 3142. Notice of the dishonor of a negotiable instrument may be given—

Notice, by  
whom given.

1. By a holder thereof; or,
2. By any party to the instrument who might be compelled to pay it to the holder, and who would, upon taking it up, have a right to reimbursement from the party to whom the notice is given.

N. Y. C. C., Sec. 1756.

SEC. 3143. A notice of dishonor may be given in any form which describes the instrument with reasonable certainty, and substantially informs the party receiving it that the instrument has been dishonored.

Form of  
notice.

N. Y. C. C., Sec. 1757.

SEC. 3144. A notice of dishonor may be given—

Notice, how  
served.

1. By delivering it to the party to be charged, personally, at any place; or,
2. By delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him; or,
3. By properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the Post-office most conveniently accessible from the place where the presentment was made, and paying the postage thereon.

N. Y. C. C., Sec. 1758.

SEC. 3145. In case of the death of a party to whom notice of dishonor should otherwise be given, the notice must be given to one of his personal representatives; or, if there are none, then to any member of his family who resided with him at his death; or, if there is none, then it must be mailed to his last place of residence, as prescribed by Subd. 3 of the last section.

Notice, how  
served after  
indorser's  
death.

Modified from Story on Notes, Sec. 310, in which it is said that notice should be left at the domicile of the de-

ceased. This would often fail to reach his representatives; more often than under the rule above given.

N. Y. C. C., Sec. 1759.

Notice given  
in ignorance  
of death,  
valid.

SEC. 3146. A notice of dishonor sent to a party after his death, but in ignorance thereof, and in good faith, is valid.

N. Y. C. C., Sec. 1760.

Notice, when  
to be given.

SEC. 3147. Notice of dishonor, when given by the holder of an instrument, or his agent, otherwise than by mail, must be given on the day of dishonor, or on the next business day thereafter.

N. Y. C. C., Sec. 1761.

Notice of  
dishonor,  
when to be  
mailed.

SEC. 3148. When notice of dishonor is given by mail, it must be deposited in the Post-office in time for the first mail which closes after noon of the first business day succeeding the dishonor, and which leaves the place from which, for the place to which, the notice should be sent.

N. Y. C. C., Sec. 1762.

Notice, how  
given by  
agent.

SEC. 3149. When the holder of a negotiable instrument, at the time of its dishonor, is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an indorser, and his principal may give notice to any other party to be charged, as if he were himself an indorser. And if an agent of the owner employs a sub-agent, it is sufficient for each successive agent or sub-agent to give notice in like manner to his own principal.

N. Y. C. C., Sec. 1763.

Additional  
time for  
notice by  
indorser.

SEC. 3150. Every party to a negotiable instrument, receiving notice of its dishonor, has the like time thereafter to give similar notice to prior parties, as the original holder had after its dishonor. But this additional time is available only to the particular party entitled thereto.

N. Y. C. C., Sec. 1764.

Effect of  
notice of  
dishonor.

SEC. 3151. A notice of the dishonor of a negotiable instrument, if valid in favor of the party giving it, inures to the benefit of all other parties thereto, whose right to give the like notice has not been lost.

N. Y. C. C., Sec. 1765.



## ARTICLE VI.

## EXCUSE OF PRESENTMENT AND NOTICE.

SECTION 3155. Notice of dishonor, when excused.

3156. Presentment and notice, when excused.

3157. Same.

3158. Delay, when excused.

3159. Waiver of presentment and notice.

3160. Waiver of protest.

NOTE.—If the provision of Sec. 3131, requiring presentment to be made to a Notary Public in certain cases, is not adopted, it will be necessary to insert here a section as follows :

SEC. —. The presentment of a negotiable instrument for payment is excused—

1. When neither the place of payment, if any, designated in the instrument, nor the place of residence or business of the principal debtor can, with reasonable diligence, be ascertained by the holder; or,

2. When no person to whom presentment may properly be made can, with reasonable diligence, be found by the holder; or,

3. When the instrument designates no place of payment, but purports to be signed by the principal debtor within this State, and he resided therein at the time of signing, but has removed therefrom.

SEC. 3155. Notice of dishonor is excused—

1. When the party by whom it should be given cannot, with reasonable diligence, ascertain either the place of residence or business of the party to be charged; or,

2. When there is no Post-office communication between the town of the party by whom the notice should be given, and the town in which the place of residence or business of the party to be charged is situated; or,

3. When the party to be charged is the same person who dishonors the instrument; or,

4. When the notice is waived by the party entitled thereto.

N. Y. C. C., Sec. 1766.

SEC. 3156. Presentment and notice are excused as to any party to a negotiable instrument, who informs the holder, within ten days before its maturity, that it will be dishonored.

N. Y. C. C., Sec. 1767.

SEC. 3157. If, before or after the maturity of an instrument, an indorser has received full security for the amount thereof, or the maker has assigned all his estate

\* Notice of dishonor, when excused.

Presentment and notice, when excused.

Same.

to him as such security, presentment and notice to him are excused.

*Mechanics' Bank vs. Griswold*, 7 Wend., 165; *Corney vs. Da Costa*, 1 Esp., 302; limited in *Seacord vs. Miller*, 13 N. Y., 55.

This rule is founded upon the same principle as the series of cases that were overthrown in *Hall vs. Newcomb*, 7 Hill, 416; and perhaps ought to share their fate. If the maker intends that the indorser shall waive notice, he will naturally so stipulate with him, or will give the security to the holder outright. The following is suggested instead of this section:

[Sec. 1768. No transactions between the maker and indorser of a negotiable instrument waive or excuse notice of dishonor to the latter, unless they so agree.]

This latter rule is established in Connecticut (*Holland vs. Turner*, 10 Conn., 308, 317).

N. Y. C. C., Sec. 1768.

Delay, when excused.

SEC. 3158. Delay in presentment, or in giving notice of dishonor, is excused, when caused by circumstances which the party delaying could not have avoided by the exercise of reasonable care and diligence.

N. Y. C. C., Sec. 1769.

Waiver of presentment and notice.

SEC. 3159. A waiver of presentment waives notice of dishonor also, unless the contrary is expressly stipulated; but a waiver of notice does not waive presentment.

*Buchanan vs. Marshall*, 22 Vt., 561; *Burnham vs. Webster*, 17 Mo., 50.

N. Y. C. C., Sec. 1770.

Waiver of protest.

SEC. 3160. A waiver of protest on any negotiable instrument other than a foreign bill of exchange, waives presentment and notice.

*Coddington vs. Davis*, 1 N. Y., 186; 3 Den., 16.

N. Y. C. C., Sec. 1771.

## ARTICLE VII.

### EXTINCTION OF NEGOTIABLE INSTRUMENTS.

SECTION 3164. Obligation of party, when extinguished.

3165. Revival of obligation.

Obligation of party, when extinguished.

SEC. 3164. The obligation of a party to a negotiable instrument is extinguished—

1. In like manner with that of parties to contracts in general; or,

2. By payment of the amount due upon the instrument, at or after its maturity, in good faith and in the

ordinary course of business, to any person having actual possession thereof, and appearing, by its terms, to be entitled to payment.

See Secs. 1744 and 1745, and notes. By the commercial law, as recognized in England, a simple agreement to waive the debt created by a negotiable instrument, although without a new consideration or a seal, discharges the debtor (*Foster vs. Dawber*, 6 Exch., 839; *Byles on Bills*, 5th ed., 145). But this rule has been either overlooked or overruled in this State (see *Seymour vs. Minturn*, 17 Johns., 169; *Crawford vs. Mills*, 13 id., 87; *Smith vs. Bartholomew*, 1 Meto., 276; *Ruggles vs. Patten*, 8 Mass., 480.)

N. Y. C. C., Sec. 1772.

SEC. 3165. If, after its extinction, a negotiable instrument comes into the possession of an indorsee in due course, the obligation thereof revives in his favor.

Revival of obligation.

N. Y. C. C., Sec. 1773.

## CHAPTER II.

### BILLS OF EXCHANGE.

#### ARTICLE I. FORM AND INTERPRETATION.

##### II. DAYS OF GRACE.

##### III. PRESENTMENT FOR ACCEPTANCE.

##### IV. ACCEPTANCE.

##### V. ACCEPTANCE OR PAYMENT FOR HONOR.

##### VI. PRESENTMENT FOR PAYMENT.

##### VII. EXCUSE OF PRESENTMENT AND NOTICE.

##### VIII. FOREIGN BILLS.

#### ARTICLE I.

##### FORM AND INTERPRETATION OF A BILL.

##### SECTION 3171. Bill of exchange, what.

3172. Drawee, in case of need.

3173. Bill in parts of a set.

3174. When must be in a set.

3175. Presentment, etc., of part of set.

3176. Bill, where payable.

3177. Rights and obligations of drawer.

SEC. 3171. A bill of exchange is an instrument, negotiable in form, by which one, who is called the drawer, Bill of exchange, what.

requests another, called the drawee, to pay a specified sum of money.

N. Y. C. C., Sec. 1774.

Drawee, in case of need.

SEC. 3172. A bill of exchange may give the name of any person in addition to the drawee, to be resorted to in case of need.

N. Y. C. C., Sec. 1775.

Bill in parts of a set.

SEC. 3173. A bill of exchange may be drawn in any number of parts, each part stating the existence of the others, and all forming one set.

N. Y. C. C., Sec. 1776.

When must be in a set.

SEC. 3174. An agreement to draw a bill of exchange binds the drawer to execute it in three parts, if the other party to the agreement desires it.

N. Y. C. C., Sec. 1777.

Presentment, etc., of part of set

SEC. 3175. Presentment, acceptance, or payment, of a single part in a set of a bill of exchange, is sufficient for the whole.

N. Y. C. C., Sec. 1778.

Bill, where payable.

SEC. 3176. A bill of exchange is payable—

1. At the place where, by its terms, it is made payable; or,

2. If it specifies no place of payment, then at the place to which it is addressed; or,

3. If it is not addressed to any place, then at the place of residence or business of the drawee, or wherever he may be found; or,

4. If this cannot be done, then at the office of any Notary Public in the State.

See Story on Bills, Sec. 48. This provision is new. Compare Secs. 1783 and 1748, which contain similar provisions.

N. Y. C. C., Sec. 1779.

Rights and obligations of drawer.

SEC. 3177. The rights and obligations of the drawer of a bill of exchange are the same as those of the first indorser of any other negotiable instrument.

N. Y. C. C., Sec. 1780.

## ARTICLE II.

## DAYS OF GRACE.

SECTION 3181. Days of grace.

SEC. 3181. Days of grace are not allowed.

Days of  
grace.

The Commissioners recommend that no grace be hereafter allowed upon commercial paper. This is the rule upon the continent of Europe. Should this recommendation not be adopted, the following should be substituted for the text:

[Sec. 1781. The three days following the day on which a bill of exchange, payable otherwise than at sight or on demand, becomes due by its terms, are allowed as days of grace, unless the last of such days is a holiday, in which case the next preceding business day is the last day of grace allowed.]

N. Y. C. C., Sec. 1781.

## ARTICLE III.

## PRESENTMENT FOR ACCEPTANCE.

SECTION 3185. When a bill may be presented.

3186. Presentment, how made.

3187. Presentment to joint drawees.

3188. When presentment to be made to drawee in case of need.

3189. Presentment, when must be made.

SEC. 3185. At any time before a bill of exchange is payable, the holder may present it to the drawee for acceptance, and if acceptance is refused, the bill is dishonored.

When a bill  
may be pre-  
sented.

N. Y. C. C., Sec. 1782.

SEC. 3186. Presentment for acceptance must be made in the following manner, as nearly as by reasonable diligence it is practicable:

Present-  
ment, how  
made.

1. The bill must be presented by the holder.
2. It must be presented on a business day, and within reasonable hours.
3. It must be presented to the drawee, if he can be found within the State; and if not, then at his place of residence or business, if within the State, to any person of discretion therein; and if he has no such place of residence or business, or there is no person of discretion therein, then to any Notary Public in the State; and,
4. If the drawee requests it, the bill must be left with him until the same hour of the next day, to which time he may postpone his acceptance or refusal.

See Story on Bills, Sec. 237; 1 R. S., 768. The clause providing for presentment to a Notary Public is new, but is in conformity to Secs. 1748 and 1779.

N. Y. C. C., Sec. 1783.

Presentment  
to joint  
drawees.

SEC. 3187. Presentment for acceptance to one of several joint drawees, and refusal by him, dispense with presentment to the others.

This question has been considered very doubtful (Story on Bills, Sec. 229), but is decided in effect by the case of Carman vs. Pultz (21 N. Y., 531).

N. Y. C. C., Sec. 1784.

When pre-  
sentment to  
be made to  
drawee in  
case of need.

SEC. 3188. A bill of exchange which specifies a drawee in case of need, must be presented to him for acceptance or payment, as the case may be, before it can be treated as dishonored.

N. Y. C. C., Sec. 1785.

Present-  
ment, when  
must be  
made.

SEC. 3189. When a bill of exchange is payable at a specified time after sight, the drawer and indorsers are exonerated if it is not presented for acceptance within ten days after the time which would suffice, with ordinary diligence, to forward it for acceptance, unless presentment is excused.

At present the only rule established is that "due diligence" must be used (Wethey vs. Andrews, 3 Hill, 532; Smith vs. Jones, 20 Wend., 192; Robinson vs. Ames, 20 Johns., 146). But this is too indefinite.

N. Y. C. C., Sec. 1786.

#### ARTICLE IV.

##### ACCEPTANCE.

SECTION 3193. Acceptance, how made.

3194. Holder entitled to acceptance on face of bill.

3195. What acceptance sufficient with consent of holder.

3196. Acceptance by separate instrument.

3197. Promise to accept, when equivalent to acceptance.

3198. Cancellation of acceptance.

3199. What is admitted by acceptance.

Acceptance,  
how made.

SEC. 3193. An acceptance of a bill must be made in writing, by the drawee or by an acceptor for honor, and may be made by the acceptor writing his name across the face of the bill, with or without other words.

N. Y. C. C., Sec. 1787.

SEC. 3194. The holder of a bill of exchange, if entitled to an acceptance thereof, may treat the bill as dishonored if the drawee refuses to write across its face an unqualified acceptance.

Holder entitled to acceptance on face of bill.

N. Y. C. C., Sec. 1788.

SEC. 3195. The holder of a bill of exchange may, without prejudice to his rights against prior parties, receive and treat as a sufficient acceptance—

What acceptance sufficient with consent of holder.

1. An acceptance written upon any part of the bill, or upon a separate paper.

2. An acceptance qualified so far only as to make the bill payable at a particular place within the city or town, in which, if the acceptance was unqualified, it would be payable; or,

3. A refusal by the drawee to return the bill to the holder after presentment; in which case the bill is payable immediately, without regard to its terms.

This provision [for refusal to return the bill] is new, but seems to be no more than reasonable, the act amounting to a conversion, for which the owner might recover damages to the value of the bill.

N. Y. C. C., Sec. 1789.

SEC. 3196. The acceptance of a bill of exchange, by a separate instrument, binds the acceptor only to one to whom it has been shown, and who, upon the faith thereof, has given value for the bill.

Acceptance by separate instrument.

1 R. S., 768, Sec. 7. See *Burns vs. Robbins*, 40 Barb., 368. There does not seem to be any strong reason for restricting the benefit of such an acceptance to holders for value, as distinguished from other holders for a good consideration.

N. Y. C. C., Sec. 1790.

SEC. 3197. An unconditional promise, in writing, to accept a bill of exchange, is a sufficient acceptance thereof, in favor of every person to whom it has been shown, and who, upon the faith thereof, has given value for the bill.

Promise to accept, when equivalent to acceptance.

N. Y. C. C., Sec. 1791; Sec. 8, "Bills of Exchange and Promissory Notes" (Hittell).

SEC. 3198. The acceptor of a bill of exchange may cancel his acceptance at any time before delivering the bill to the holder, and before the holder has, with the consent of the acceptor, transferred his title to another person who has given value for it upon the faith of such acceptance.

Cancellation of acceptance.

N. Y. C. C., Sec. 1792.

What is  
admitted by  
acceptance.

SEC. 3199. The acceptance of a bill of exchange admits the capacity of the drawer to draw and indorse it; and if written upon the bill, it also admits the same to be genuine, and binding upon the drawer; but it does not admit the signature of any indorser to be genuine.

N. Y. C. C., Sec. 1793.

#### ARTICLE V.

##### ACCEPTANCE OR PAYMENT FOR HONOR.

SECTION 3203. When bill may be accepted or paid for honor.

3204. Holder of bill of exchange bound to accept payment for honor.

3205. Acceptance for honor, how made.

3206. How enforced.

3207. Notice of dishonor not excused by acceptance for honor.

When bill  
may be ac-  
cepted or  
paid for  
honor.

SEC. 3203. On the dishonor of a bill of exchange by the drawee, and, in case of a foreign bill, after it has been duly protested, it may be accepted or paid by any person, for the honor of any party thereto.

N. Y. C. C., Sec. 1794.

Holder of bill  
of exchange  
bound to  
accept pay-  
ment for  
honor.

SEC. 3204. The holder of a bill of exchange is not bound to allow it to be accepted for honor, but is bound to accept payment for honor.

N. Y. C. C., Sec. 1795.

Acceptance  
for honor.  
how made.

SEC. 3205. An acceptor or payer for honor must write a memorandum upon the bill, stating therein for whose honor he accepts or pays, and must give notice to such parties, with reasonable diligence, of the fact of such acceptance or payment. Having done so, he is entitled to reimbursement from such parties, and from all parties prior to them.

N. Y. C. C., Sec. 1796.

How en-  
forced.

SEC. 3206. A bill of exchange, which has been accepted for honor, must be presented at its maturity to the drawee for payment, and notice of its dishonor by him must be given to the acceptor for honor, in like manner as to an indorser; after which the acceptor for honor must pay the bill.

N. Y. C. C., Sec. 1797.



SEC. 3207. The acceptance of a bill of exchange for honor does not excuse the holder from giving notice of its dishonor by the drawee.

Notice of dishonor not excused by acceptance for honor.

N. Y. C. C., Sec. 1798.

## ARTICLE VI.

### PRESENTMENT FOR PAYMENT.

SECTION 3211. Presentment, when bill not accepted, where made.

3212. Presentment of bill, payable at particular place.

3213. Effect of delay in presentment in certain cases.

3214. Effect in other cases.

SEC. 3211. If a bill of exchange is by its terms payable at a particular place, and is not accepted on presentment, it must be presented at the same place for payment, when presentment for payment is necessary.

Presentment when bill not accepted, where made.

N. Y. C. C., Sec. 1799.

SEC. 3212. A bill of exchange, accepted payable at a particular place, must be presented at that place for payment, when presentment for payment is necessary, and need not be presented elsewhere.

Presentment of bill payable at particular place

N. Y. C. C., Sec. 1800.

SEC. 3213. If a bill of exchange, payable at sight or on demand, without interest, is not duly presented for payment within ten days after the time in which it could, with reasonable diligence, be transmitted to the proper place for such presentment, the drawer and indorsers are exonerated, unless such presentment is excused.

Effect of delay in presentment in certain cases

N. Y. C. C., Sec. 1801.

SEC. 3214. Mere delay in presenting a bill of exchange payable with interest, at sight or on demand, does not exonerate any party thereto.

Effect in other cases.

N. Y. C. C., Sec. 1802.

## ARTICLE VII.

### EXCUSE OF PRESENTMENT AND NOTICE.

SECTION 3218. Presentment, when excused.

3219. Delay, when excused.

3220. Presentment and notice, when excused.

Presentment, when excused.

SEC. 3218. The presentment of a bill of exchange for acceptance is excused if the drawee has not capacity to accept it.

If the provision of Sec. 1783, requiring presentment to a Notary, is not adopted, this section must be modified by inserting, after "excused," "if the holder cannot, with reasonable diligence, find any person authorized to accept it, or."

N. Y. C. C., Sec. 1803.

NOTE.—See Secs. 3186 and 3131.

Delay, when excused.

SEC. 3219. Delay in the presentment of a bill of exchange for acceptance is excused, when caused by circumstances over which the holder has no control.

N. Y. C. C., Sec. 1804.

Presentment and notice, when excused.

SEC. 3220. Presentment of a bill of exchange for acceptance or payment, and notice of its dishonor, are excused as to the drawer, if he forbids the drawee to accept, or the acceptor to pay the bill; or if, at the time of drawing, he had no reason to believe that the drawee would accept or pay the same.

N. Y. C. C., Sec. 1805.

## ARTICLE VIII.

### FOREIGN BILLS.

#### SECTION 3224. Definitions.

- 3225. Protest necessary.
- 3226. Protest, by whom made.
- 3227. Protest, how made.
- 3228. Protest, where made.
- 3229. Protest, when to be made.
- 3230. Protest, when excused.
- 3231. Notice of protest, how given.
- 3232. Waiver of protest.
- 3233. Declaration before payment for honor.
- 3234. Damages allowed on dishonor of foreign bill.
- 3235. Rate of damages.
- 3236. Interest on amount of protested bill.
- 3237. Damages, how estimated.
- 3238. Same.

Definitions.

SEC. 3224. An inland bill of exchange is one drawn and payable within this State. All others are foreign.

It has been strongly urged upon the Commissioners, by gentlemen whose experience entitles their opinion to great weight, that all bills drawn and payable within the United States should be deemed inland bills. The adoption of this suggestion would, however, involve so great a change that

it is considered advisable to leave the text as it is, and submit the question to the wisdom of the Legislature.

N. Y. C. C., Sec. 1806.

SEC. 3225. Notice of the dishonor of a foreign bill of exchange can be given only by notice of its protest. Protest necessary.

N. Y. C. C., Sec. 1807.

SEC. 3226. Protest must be made by a Notary Public, if with reasonable diligence one can be obtained; and if not, then by any reputable person, in the presence of two witnesses. Pr. test, by whom made.

N. Y. C. C., Sec. 1808.

SEC. 3227. Protest must be made by an instrument in writing, giving a literal copy of the bill of exchange, with all that is written thereon, or annexing the original; stating the presentment, and the manner in which it was made; the presence or absence of the drawee or acceptor, as the case may be; the refusal to accept or to pay, or the inability of the drawee to give a binding acceptance; and in case of refusal, the reason assigned, if any; and finally, protesting against all the parties to be charged. Protest, how made.

N. Y. C. C., Sec. 1809.

SEC. 3228. A protest for non-acceptance must be made in the city or town in which the bill is presented for acceptance; and a protest for non-payment in the city or town in which it is presented for payment. Protest, where made.

N. Y. C. C., Sec. 1810.

SEC. 3229. A protest must be noted on the day of presentment, or on the next business day; but it may be written out at any time thereafter. Protest, when to be made.

N. Y. C. C., Sec. 1811.

SEC. 3230. The want of a protest of a foreign bill of exchange, or delay in making the same, is excused in like cases with the want or delay of presentment. Protest, when excused.

N. Y. C. C., Sec. 1812.

SEC. 3231. Notice of protest must be given in the same manner as notice of dishonor, except that it may be given by the Notary who makes the protest. Notice of protest, how given.

N. Y. C. C., Sec. 1813.

Waiver of protest.

SEC. 3232. If a foreign bill of exchange on its face waives protest, notice of dishonor may be given to any party thereto, in like manner as of an inland bill; except that if any indorser of such a bill expressly requires protest to be made, by a direction written on the bill at or before his indorsement, protest must be made, and notice thereof given to him and to all subsequent indorsers.

N. Y. C. C., Sec. 1814.

Declaration before payment for honor.

SEC. 3233. One who pays a foreign bill of exchange for honor must declare, before payment, in the presence of a person authorized to make protest, for whose honor he pays the same, in order to entitle him to reimbursement.

N. Y. C. C., Sec. 1815.

Damages allowed on dishonor of foreign bill.

SEC. 3234. Damages are allowed as hereinafter prescribed, as a full compensation for interest, re-exchange, expenses, and all other damages, in favor of holders for value only, upon bills of exchange drawn or negotiated within this State, and protested for non-acceptance or non-payment.

N. Y. C. C., Sec. 1816.

Rate of damages.

SEC. 3235. Damages are allowed under the last section upon bills drawn upon any person—

1. If such bill is drawn upon any person in any of the United States east of the Rocky Mountains, fifteen dollars upon the hundred, upon the principal sum specified in the bill.

2. If such bill is drawn upon any person in any port or place in Europe, or in any foreign country, twenty dollars upon the hundred, upon the principal sum specified in the bill.

NOTE.—“Bills of Exchange,” Sec. 12. (Hittell.) Subd. 1 needs to be reconstructed, specifying the States and Territories; a third added, fixing five per cent. damages in this State, and a fourth, fixing ten per cent. in Pacific States outside of California.

Interest on amount of protested bill.

SEC. 3236. From the date of protest, lawful interest must be allowed upon the aggregate amount of the principal sum specified in the bill, and the damages mentioned in the preceding section.

“Bills of Exchange,” Sec. 13. (Hittell.)

SEC. 3237. If the amount of a protested bill of exchange is expressed in money of the United States, damages are estimated upon such amount without regard to the rate of exchange.

Damages,  
how esti-  
mated.

N. Y. C. C., Sec. 1818.

SEC. 3238. If the amount of a protested bill of exchange is expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest, in the place nearest to the place where the bill was negotiated, and where such bills are currently sold.

Same.

N. Y. C. C., Sec. 1819.

### CHAPTER III.

#### PROMISSORY NOTES.

SECTION 3244. Promissory note, what.

3245. Certain instruments, promissory notes.

3246. Bill of exchange, when converted into a note.

3247. Certain sections applicable to notes.

3248. Effect of delay in presentment.

SEC. 3244. A promissory note is an instrument, negotiable in form, whereby the signer promises to pay a specified sum of money.

Promissory  
note, what.

N. Y. C. C., Sec. 1820.

SEC. 3245. An instrument in the form of a bill of exchange, but drawn upon and accepted by the drawer himself, is to be deemed a promissory note.

Certain  
instruments,  
promissory  
notes.

N. Y. C. C., Sec. 1821.

SEC. 3246. A bill of exchange, if accepted, with the consent of the owner, by a person other than the drawee, or an acceptor for honor, becomes in effect the promissory note of such person, and all prior parties thereto are exonerated.

Bill of ex-  
change,  
when con-  
verted into  
a note.

N. Y. C. C., Sec. 1822.

SEC. 3247. Chap. I of this Title, and Secs 3181 and 3214 of this Code, apply to promissory notes.

Certain  
sections  
applicable  
to notes.

N. Y. C. C., Sec. 1823.

Effect of  
delay in pre-  
sentment

SEC. 3248. If a promissory note, payable on demand, or at sight, without interest, is not duly presented for payment, within six months from its date, the indorsers thereof are exonerated, unless such presentment is excused.

N. Y. C. C., Sec. 1824.

## CHAPTER IV.

### CHECKS.

SECTION 3254. Check, what.

3255. Rules applicable to checks.

Check, what.

SEC. 3254. A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand, without interest.

N. Y. C. C., Sec. 1825.

Rules appli-  
cable to  
checks.

SEC. 3255. A check is subject to all the provisions of this Code concerning bills of exchange, except that—

1. The drawer and indorsers are exonerated by delay in presentment, only to the extent of the injury which they suffer thereby, and are exonerated to that extent by a delay of more than one day in presentment.

2. An indorsee, after its apparent maturity, but without actual notice of its dishonor, acquires a title equal to that of an indorsee before such period.

N. Y. C. C., Sec. 1826.

## CHAPTER V.

### BONDS, BANK NOTES AND CERTIFICATES OF DEPOSIT.

SECTION 3361. Bank note negotiable after payment.

3362. Title acquired by indorsee.

Bank note  
negotiable  
after pay-  
ment.

SEC. 3261. A bank note remains negotiable, even after it has been paid by the maker.

N. Y. C. C., Sec. 1827.

SEC. 3262. A transferee of a bond, bank note or certificate of deposit, after its apparent maturity or actual dishonor within his knowledge, acquires a title equal to that of a transferee before such event.

Title acquired by indorsee.

N. Y. C. C., Sec. 1828.

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## TITLE XVI.

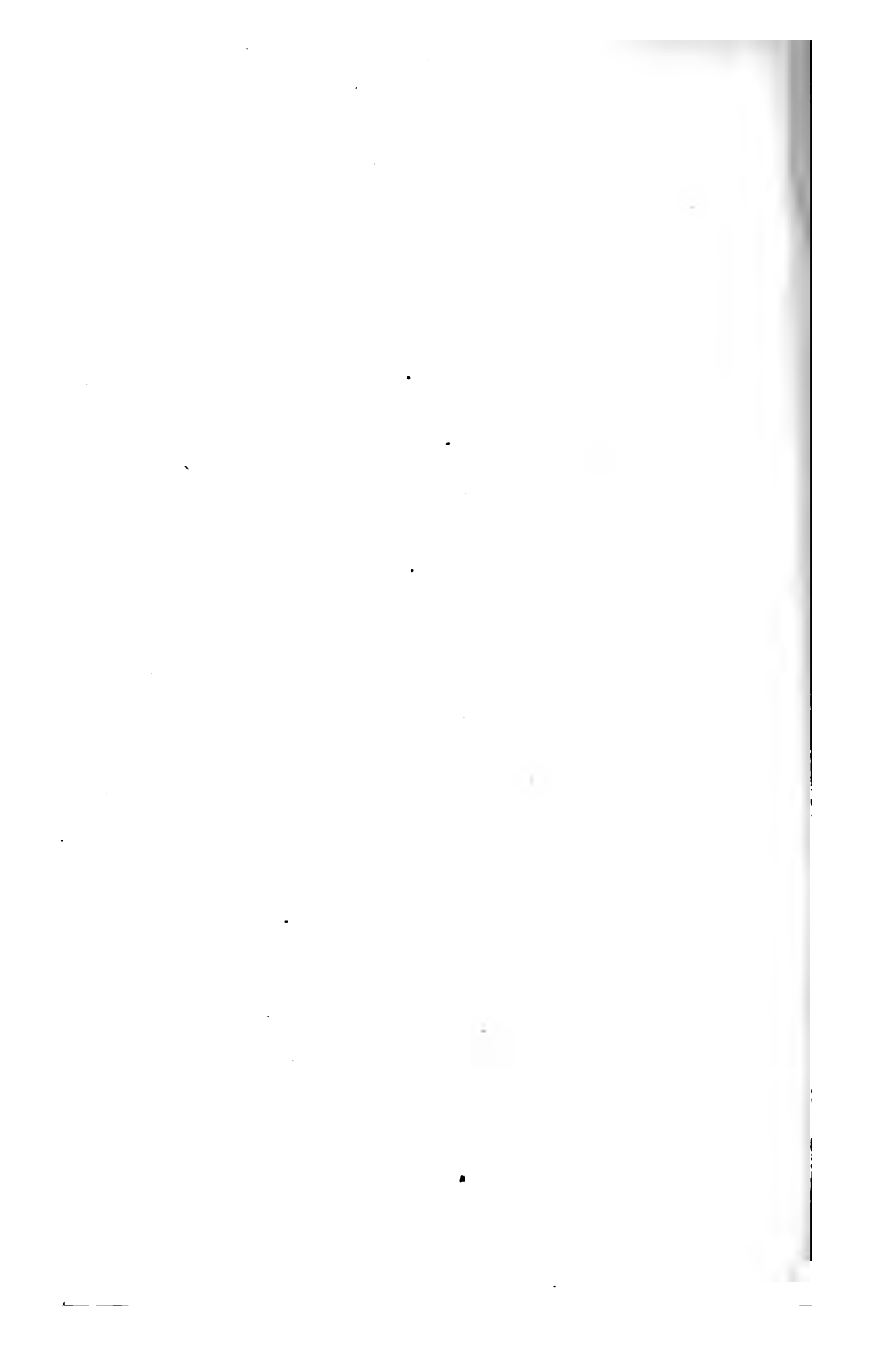
### GENERAL PROVISIONS.

SECTION 3268. Parties may waive provisions of Code.

SEC. 3268. Except where it is otherwise declared, the provisions of the foregoing fifteen Titles of this Part, in respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties, when ascertained in the manner prescribed by the chapter on the *Interpretation of Contracts*; and the benefit thereof may be waived by any party entitled thereto, unless such waiver would be against public policy.

Parties may waive provisions of Code.

N. Y. C. C., Sec. 1829.





## DIVISION FOURTH.

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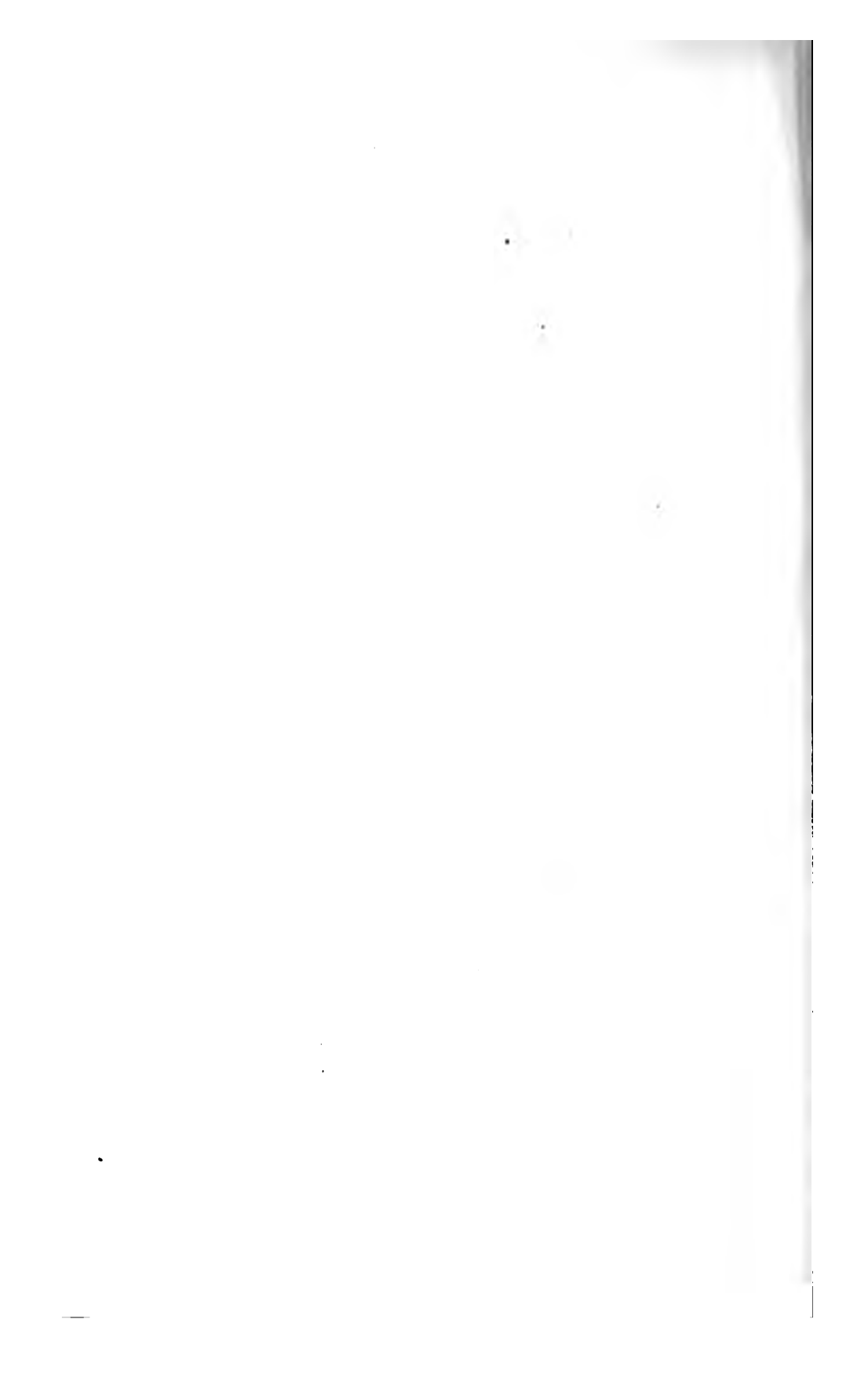
PART I. RELIEF.

II. SPECIAL RELATIONS OF DEBTOR AND  
CREDITOR.

III. NUISANCE.

IV. MAXIMS OF JURISPRUDENCE.

V. DEFINITIONS AND GENERAL PROVI-  
SIONS.



# PART I.

## RELIEF.

- TITLE I. RELIEF IN GENERAL.
- II. COMPENSATORY RELIEF.
- III. SPECIFIC RELIEF.
- IV. PREVENTIVE RELIEF.

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## TITLE I.

### RELIEF IN GENERAL.

SECTION 3274. Species of relief.

3275. Relief in case of forfeiture.

SEC. 3274. As a general rule, compensation is the relief or remedy provided by the law of this State for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this Part of the CIVIL CODE.

Species of relief.

N. Y. C. C., Sec. 1830.

SEC. 3275. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful or fraudulent breach of duty.

Relief in case of forfeiture.

Though this doctrine, especially as applied to contracts, is one in its origin of purely equitable cognizance, it is now to be applied in all actions, and to be considered in estimating damages, as well as in granting specific relief (see *Spaulding vs. Hallenbeck*, 39 Barb., 78).

N. Y. C. C., Sec. 1831.

## TITLE II.

## COMPENSATORY RELIEF.

CHAPTER I. DAMAGES IN GENERAL.  
II. MEASURE OF DAMAGES.

## CHAPTER I.

## DAMAGES IN GENERAL.

ARTICLE I. GENERAL PRINCIPLES.  
II. INTEREST AS DAMAGES.  
III. EXEMPLARY DAMAGES.

## ARTICLE I.

## GENERAL PRINCIPLES.

SECTION 3281. Person suffering detriment, may recover damages.

3282. Detriment, what.

3283. Injuries resulting or probable after suit brought.

Person  
suffering  
detriment  
may recover  
damages.

SEC. 3281. Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.

N. Y. C. C., Sec. 1832.

Detriment,  
what.

SEC. 3282. Detriment is a loss or harm suffered in person or property.

This word is used in order to avoid the repetition of the words "loss or harm" in the numerous places in which they must otherwise occur. Injury signifies the wrongful act, and not its results, while on the other hand there may be loss without injury. The phrase "*damnum absque injuria*," is familiar to lawyers. The word "harm" alone would be inadequate to express all the meaning of "loss."

N. Y. C. C., Sec. 1833.

Injuries  
resulting or  
probable  
after suit  
brought.

SEC. 3283. Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.

N. Y. C. C., Sec. 1834.

## ARTICLE II.

## INTEREST AS DAMAGES.

SECTION 3287. Person entitled to recover damages, may recover interest thereon.

3288. In actions other than contract.

3289. Limit of rate by contract.

3290. Acceptance of principal waives claim to interest.

SEC. 3287. Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

Person entitled to recover damages, may recover interest thereon.

N. Y. C. C., Sec. 1835.

SEC. 3288. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud or malice, interest may be given, in the discretion of the jury.

In actions other than contract.

Sedgw. Dam., 385, 386; Wilson vs. Conine, 2 Johns., 280; Bissel vs. Hopkins, 4 Cow., 53; Hyde vs. Stone, 7 Wend., 354; Baker vs. Weller, 8 Wend., 504; Dillerback vs. Jerome, 7 Cow., 294; Beals vs. Guernsey, 8 Johns., 446.

N. Y. C. C., Sec. 1836.

SEC. 3289. Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.

Limit of rate by contract.

This rule is established in California, by statute (Kohler vs. Smith, 2 Cal., 597). The common law rule is otherwise. Compare Lawrence vs. Leake & Watts Orphan House, 2 Den., 577.

N. Y. C. C., Sec. 1837.

SEC 3290. Accepting payment of the whole principal, as such, waives all claim to interest.

Acceptance of principal waives claim to interest.

N. Y. C. C., Sec. 1838.

## ARTICLE III.

## EXEMPLARY DAMAGES.

SECTION 3294. Exemplary damages, in what cases allowed.

Exemplary damages, in what cases allowed.

SEC. 3294. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

In this the Commissioners have taken the rule as now settled in this State by the Court of Appeals (*Hunt vs. Bennett*, 19 N. Y., 173; and see *Johnson vs. Jenkins*, 24 N. Y., 252; *Fry vs. Bennett*, 1 Abb. Pr., 289; 4 Duer, 247; *Brown vs. Chadsey*, 39 Barb., 253, 259; *Sharon vs. Mosher*, 17 Barb., 518). The propriety of allowing damages by way of punishment has been, however, very earnestly and ably questioned. See the discussion of this subject in *Sedgwick on Dam.*, 3d ed., Chap. 18, and especially p. 477, note 2; and Appendix.

N. Y. C. C., Sec. 1839.

NOTE.—The same rule prevails in this State. (*Wilson vs. Middleton*, 2 Cal., 54; *Nightingale vs. Scannell*, 18 Cal., 315; *Dorsey vs. Manlove*, 14 Cal., 553.

## CHAPTER II.

### MEASURE OF DAMAGES.

#### ARTICLE I. DAMAGES FOR BREACH OF CONTRACT.

##### II. DAMAGES FOR WRONGS.

##### III. PENAL DAMAGES.

##### IV. GENERAL PROVISIONS.

#### ARTICLE I.

##### DAMAGES FOR BREACH OF CONTRACT.

#### SECTION 3300. Measure of damages for breach of contract.

- 3301. Must be in contemplation of parties.
- 3302. Of which the parties have notice.
- 3303. Damages must be certain.
- 3304. Breach of promise to pay liquidated sum.
- 3305. Dishonor of bills of exchange.
- 3306. Breach of covenant of seisin, etc.
- 3307. Rescission of contract by covenantee, when.
- 3308. Breach of certain Code covenants, how determined.
- 3309. Damages where title is void.
- 3310. Damages where title is defective or disputed.
- 3311. Failure to perfect title not to preclude obtaining relief, when.
- 3312. On payment of costs before action or judgment, covenantor may perfect title.

## SECTION 3313. Breach of Common Law Covenant against encumbrances.

3314. Damages where encumbrance is upon only a part of the property.

3315. Breach of Special Code Covenants against encumbrances.

3316. Breach of agreement to convey real property.

3317. Breach of agreement to buy real property.

3318. Breach of agreement to sell personal property, not paid for.

3319. Breach of agreement to sell personal property, paid for.

3320. Breach of agreement to pay for personal property sold.

3321. Breach of agreement to buy personal property.

3322. Breach of warranty of title to personal property.

3323. Breach of warranty of quality of personal property.

3324. Breach of warranty of quality for special purpose.

3325. Breach of carrier's obligation to receive goods, etc.

3326. Breach of carrier's obligation to deliver.

3327. Carrier's delay.

3328. Breach of warranty of authority.

3329. Breach of promise of marriage.

NOTE.—The following is Sec. 1840 of the New York Civil Code, and its references :

Sec. 1840. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, which the party in fault had notice at the time of entering into the contract, or at any time before the breach, and while it was in his power to perform the contract on his part, would be likely to result from such breach, or which, in the ordinary course of things, would be likely to result therefrom.

*Note A.*—Griffin vs. Colver, 16 N. Y., 489; Hadley vs. Baxendale, 9 Exch., 341; Gee vs. Lanc. & Yorksh. Railw. Co., 6 H. & N., 211; Wilson vs. L. & Y. Railw. Co., 9 C. B. [N. S.], 632; Landsberger vs. Magnetic Telegraph Co., 32 Barb., 530; Smeed vs. Foord, 1 El. & El., 602; Boyd vs. Fitt, 14 Irish Law, 43.

*Note B.*—This provision adopts the suggestion of Baron Bramwell, in Gee vs. L. & Y. Railw. Co. (6 H. & N., 211), though it is conceded that it is not undoubted law. See also, as to extraordinary damages, Dunlop vs. Higgins, 1 H. of L. Cas., 381.

*Note C.*—This clause is plainly a just qualification of the preceding one.

The three following sections have been substituted for the one New York section. Notes *A*, *B*, *C*, refer to sections as follows: Note *A*, to Sec. 3300; Note *B*, to Sec. 3301; Note *C*, to Sec. 3302. We think the reasons for making the change will be obvious. The change is only in the form of expression.

SEC. 3300. For the breach of an obligation arising from a contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby.

Measure of  
damages for  
breach of  
contract.

N. Y. C. C., Sec. 1840.

Must be in  
contempla-  
tion of  
parties.

SEC. 3301. When the detriment is reasonably within the contemplation of the parties at the time of entering into the contract, it is proximate detriment.

[New section.] Based on N. Y. C. C., Sec. 1840.

Of which the  
parties have  
notice.

SEC. 3302. When the party in fault, at the time of entering into the contract, or at any time before breach, and while it is in his power to perform the contract on his part, has notice of detriment which would, in the ordinary course of things, result from such breach, such detriment is proximate.

[New section.] Based on N. Y. C. C., Sec. 1840.

Damages  
must be  
certain.

SEC. 3303. No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin.

Griffin vs. Colver, 16 N. Y., 489, 495.  
N. Y. C. C., Sec. 1841.

Breach of  
promise to  
pay liquida-  
ted sum.

SEC. 3304. The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon.

Sedgw. Dam., 236; Code La., 1929.  
N. Y. C. C., Sec. 1842.

Dishonor  
of bills of  
exchange.

SEC. 3305. For the dishonor of foreign bills of exchange, the damages are prescribed by Secs. 3235, 3237 and 3238.

N. Y. C. C., Sec. 1843.

Breach of  
covenant of  
seisin, etc.

SEC. 3306. The detriment caused by the breach of a Common Law Covenant of "seisin," of "right to convey," of "warranty," or of "quiet enjoyment," in a grant of real property, is deemed to be—

1. The price paid to the grantor; or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore, at the time of the grant, to the value of the whole property.

2. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding four years.

3. Any expenses properly incurred by the covenantee in defending his possession.

N. Y. C. C., Sec. 1844.



NOTE.—The “right to convey,” is not mentioned as a Common Law Covenant by the New York revisers, in Sec. 868, and yet this section fixes a rule of damages for a breach of it. (See Sec. 1119 of this Code.)

SEC. 3307. Where there is a breach of a Code Covenant in respect to a part of or the whole of the property, or with respect to any particular requirement of the covenant, the covenantee may elect to rescind the contract, subject to the rules in Chap. II, Tit. V, Part II, Div. III, on *Rescission*, or he may have relief pursuant to the following sections.

Rescission of contract by covenantee, when.

[New section.]      NOTE.—See Sec. 1689.

SEC. 3308. The detriment caused by the breach of the Special Code Covenant “against prior grants made by grantor,” mentioned in Subd. 1, Sec. 1105, or of the General Code Covenant of “ownership,” mentioned in Subd. 1, Sec. 1106, is determined by the five following sections.

Breach of certain Code covenants, how determined.

[New section.]

SEC. 3309. When the title is void as to the whole or a part, the detriment is—

Damages where title is void.

1. The price paid to the grantor; or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore, at the time of the grant, to the value of the whole property.

2. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding four years.

N. Y. C. C., Sec. 1844—modified.

SEC. 3310. When the title or possession is defective or disputed, but is capable of being perfected by judicial or other proceedings, or otherwise, or when there is a paramount title, the covenantee may elect to retain the property and perfect the title or possession, or purchase the paramount title, and in such case the expenses properly incurred, not exceeding the original amount of purchase money paid, shall be the measure of damages.

Damages where title is defective or disputed.

[New section.]

SEC. 3311. If the covenantee, in good faith, undertakes to recover or defend the possession, or to obtain or perfect the title, and fails to accomplish such undertaking,

Failure to perfect title not to preclude obtaining relief, when.

he is not precluded from obtaining relief under the three preceding sections.

[New section.]

On payment of costs before action or judgment, covenantor may perfect title.

SEC. 3312. The covenantor, at any time before action, or judgment in an action on the covenant, on payment of costs, if any, may make good the covenant by supplying a paramount title, or perfecting the title granted, or by performing any act which, if performed before the execution of the covenant, would have prevented the breach.

[New section.]

Breach of Common Law Covenant against encumbrances.

SEC. 3313. The detriment caused by the breach of a Common Law Covenant against encumbrances, in a grant of an estate in real property, is deemed to be the amount which has been actually expended by the covenantee in extinguishing either the principal or interest thereof. .

N. Y. C. C., Sec. 1845—divided.

Damages where encumbrance is upon only a part of the property.

SEC. 3314. If the encumbrance mentioned in the preceding section is upon only a part of the property included in the grant, the amount of damages for the principal extinguished must be a proportion of the price paid to the grantor, equivalent to the relative value, at the time of the grant, of the property affected by the breach, as compared with the whole; or, in the latter case, interest on a like amount.

N. Y. C. C., Sec. 1845—divided.

Breach of Special Code Covenants against encumbrances.

SEC. 3315. The detriment caused by the breach of the Special Code Covenant "against encumbrances imposed or suffered by the grantor," mentioned in Subd. 2, Sec. 1105, and of the General Code Covenant "against encumbrances," mentioned in Subd. 2, Sec. 1106, must be determined by the provisions of the two preceding sections.

Breach of agreement to convey real property.

SEC. 3316. The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the

time of the breach, and the expenses properly incurred in preparing to enter upon the land.

N. Y. C. C., Sec. 1846.

SEC. 3317. The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him.

Breach of agreement to buy real property.

By the present law of this State, one who has agreed to sell real property may recover the full contract price from the purchaser, without actually transferring the title to him, if he offered to do so before commencing the action (*Richards vs. Edick*, 17 Barb., 260; *Franchot vs. Leach*, 5 Cow., 506), unless he has actually sold the property to a third person (*Wilson vs. Holden*, 16 Abb. Pr., 133). This rule is, however, an unjust one, as was admitted in *Richards vs. Edick* (17 Barb., 260), where it was said that if the question was a new one, the rule stated in the text should be adopted, but that the contrary was too well settled in this State to be changed by judicial intervention. This section follows the rule which is settled in England (*Laird vs. Pim*, 7 M. & W., 474).

N. Y. C. C., Sec. 1847.

SEC. 3318. The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled.

Breach of agreement to sell personal property not paid for.

N. Y. C. C., Sec. 1848.

SEC. 3319. The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has been fully paid to him in advance, is deemed to be the same as in case of wrongful conversion.

Breach of agreement to sell personal property paid for.

N. Y. C. C., Sec. 1849.

SEC. 3320. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price.

Breach of agreement to pay for personal property sold.

N. Y. C. C., Sec. 1850.

SEC. 3321. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be:

Breach of agreement to buy personal property.

1. If the property has been resold, pursuant to Sec. 3049, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or,

2. If the property has not been resold in the manner prescribed by Sec. 3049, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller; together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it.

This provision seems to be only reasonable. Some things are marketable only in large cities, yet are manufactured or owned, in many cases, by persons living in the country. If such things should be bought by a resident of the country, the expense of forwarding them to him might be trifling, compared with the expense of transportation to the nearest market. Justice to the buyer requires that the market price should be allowed to him, but justice to the seller requires that he should be allowed the increased cost of sending the things to market.

N. Y. C. C., Sec. 1351.

Breach of  
warranty  
of title to  
personal  
property.

SEC. 3322. The detriment caused by the breach of a warranty of the title of personal property sold, is deemed to be the value thereof to the buyer, when he is deprived of its possession, together with any costs which he has become liable to pay, in an action brought for the property by the true owner.

A different rule has been laid down in this State, conforming to the rule concerning real property (*Armstrong vs. Percy*, 5 Wend., 535); but this section states the law as it appears to be in England (see *Simone vs. Patchett*, 7 E. & B., 568), and as appears to be most in accordance with general principles.

N. Y. C. C., Sec. 1352.

Breach of  
warranty  
of quality  
of personal  
property.

SEC. 3323. The detriment caused by the breach of a warranty of the quality of personal property, is deemed to be the excess, if any, of the value which the property would have had, at the time to which the warranty referred, if it had been complied with, over its actual value at that time.

N. Y. C. C., Sec. 1353.

Breach of  
warranty  
of quality  
for special  
purpose.

SEC. 3324. The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose, is deemed to be that which is defined by the last section, together with a fair compen-

sation for the loss incurred by an effort in good faith to use it for such purpose.

N. Y. C. C., Sec. 1854.

SEC. 3325. The detriment caused by the breach of a carrier's obligation to accept freight, messages or passengers, is deemed to be the difference between the amount which he had a right to charge for the carriage, and the amount which it would be necessary to pay for the same service, when it ought to be performed.

Breach of carrier's obligation to receive goods, etc.

N. Y. C. C., Sec. 1855.

SEC. 3326. The detriment caused by the breach of a carrier's obligation to deliver freight, where he has not converted it to his own use, is deemed to be the value thereof, at the place and on the day at which it should have been delivered, deducting the freightage to which he would have been entitled, if he had completed the delivery.

Breach of carrier's obligation to deliver.

N. Y. C. C., Sec. 1856.

SEC. 3327. The detriment caused by a carrier's delay in the delivery of freight, is deemed to be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered, and the day of its actual delivery.

Carrier's delay.

The rule here adopted is supported by the weight of authority, and, as the Commissioners believe, by the weight of reason. It is to be observed that the latter branch of the rule does not include the former. Goods may advance in the market, and yet be so injured by delay as to diminish their intrinsic value. The carrier ought not to benefit by his own fault.

N. Y. C. C., Sec. 1857.

SEC. 3328. The detriment caused by the breach of a warranty of an agent's authority, is deemed to be the amount which could have been recovered and collected from his principal if the warranty had been complied with, and the reasonable expenses of legal proceedings taken, in good faith, to enforce the act of the agent against his principal.

Breach of warranty of authority.

N. Y. C. C., Sec. 1858.

Breach of  
promise of  
marriage.

SEC. 3329. The damages for the breach of a promise of marriage rest in the sound discretion of the jury.

Southard vs. Rexford, 6 Cow., 254; see Johnson vs. Jenkins, 24 N. Y., 252.

N. Y. C. C., Sec. 1859.

## ARTICLE II.

### DAMAGES FOR WRONGS.

SECTION 3333. Breach of obligation other than contract.

3334. Wrongful occupation of real property.

3335. Wilful holding over.

3336. Conversion of personal property.

3337. Same.

3338. Damages of lienor.

3339. Seduction.

3340. Injuries to animals.

Breach of  
obligation  
other than  
contract.

SEC. 3333. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

N. Y. C. C., Sec. 1860.

Wrongful  
occupation  
of real  
property.

SEC. 3334. The detriment caused by the wrongful occupation of real property, in cases not embraced in Secs. 3335, 3344, 3345 and 3346, is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession.

N. Y. C. C., Sec. 1861.

Wilful hold-  
ing over.

SEC. 3335. For wilfully holding over real property, by a person who entered upon the same, as guardian or trustee for an infant, or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination, the measure of damages is the value of the profits received during such holding over.

N. Y. C. C., Sec. 1862.

SEC. 3336. The detriment caused by the wrongful conversion of personal property, is presumed to be—

Conversion  
of personal  
property.

1. The value of the property at the time of the conversion, with interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and,

2. A fair compensation for the time and money properly expended in pursuit of the property.

N. Y. C. C., Sec. 1863.

SEC. 3337. The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent.

Same.

N. Y. C. C., Sec. 1864.

SEC. 3338. One having a mere lien on personal property, cannot recover greater damages for its conversion, from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien, and the compensation allowed by Sec. 3336 for loss of time and expenses.

Damage of  
lienor.

N. Y. C. C., Sec. 1865.

SEC. 3339. The damages for seduction rest in the sound discretion of the jury.

Seduction.

N. Y. C. C., Sec. 1866.

SEC. 3340. For wrongful injuries to animals, being subjects of property, committed wilfully, or by gross negligence, in disregard of humanity, exemplary damages may be given.

Injuries to  
animals.

N. Y. C. C., Sec. 1867.

### ARTICLE III.

#### PENAL DAMAGES.

SECTION 3344. Failure to quit, after notice.

3345. Tenant wilfully holding over.

3346. Forceful exclusion from possession of real property.

3347. Injuries to trees, etc.

3348. Injuries inflicted in a duel.

3349. Same.

Failure to  
quit, after  
notice.

SEC. 3344. For the failure of a tenant to give up the premises held by him, when he has given notice of his intention to do so, the measure of damages is double the rent which he ought otherwise to pay.

N. Y. C. C., Sec. 1868.

Tenant wil-  
fully holding  
over.

SEC. 3345. For wilfully holding over real property, by a tenant, after the end of his term, and after notice to quit has been duly given, and demand of possession made, the measure of damages is double the yearly value of the property, for the time of withholding, in addition to compensation for the detriment occasioned thereby.

N. Y. C. C., Sec. 1869.

NOTE.—Secs. 791 and 792 of this Code must be substituted for the two preceding sections, before adoption. Their sameness of subject and difference of locality was discovered too late to remedy in this print—one of the little accidents in revision.

Forcible  
exclusion  
from posses-  
sion of real  
property.

SEC. 3346. For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of.

N. Y. C. C., Sec. 1870.

NOTE.—Change Sec. 1174 (C. C. P.) to correspond with the three preceding sections, or change these sections to correspond with that.

Injuries to  
trees, etc.

SEC. 3347. For wrongful injuries to timber, trees or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment.

N. Y. C. C., Sec. 1871.

Injuries  
inflicted in  
a duel.

SEC. 3348. If any person slays or permanently disables another person in a duel in this State, the slayer shall provide for the maintenance of the widow or wife of the person slain or permanently disabled, and for the minor children, in such manner and at such cost, either by aggregate compensation in damages to each, or by a



monthly, quarterly or annual allowance, to be determined by the Court.

[New section.] Based on Stats. 1855, 152.

SEC. 3349. If any person slays or permanently disables another person in a duel in this State, the slayer shall be liable for and shall pay all debts of the person slain or permanently disabled. Same.

[New section.] Based on Stats. 1855, 152.

#### ARTICLE IV.

##### GENERAL PROVISIONS.

SECTION 3353. Value, how estimated in favor of seller.

3354. Value, how estimated in favor of buyer.

3355. Property of peculiar value.

3356. Value of thing in action.

3357. Damages allowed in this chapter, exclusive of others.

3358. Limitation of damages.

3359. Damages to be reasonable.

3360. Nominal damages.

SEC. 3353. In estimating damages, the value of property, to a seller thereof, is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale. Value, how estimated in favor of seller.

N. Y. C. C., Sec. 1872.

SEC. 3354. In estimating damages, except as provided by Secs. 3355 and 3356, the value of property, to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice, with reasonable diligence, for him to make such a purchase. Value, how estimated in favor of buyer.

N. Y. C. C., Sec. 1873.

SEC. 3355. Where certain property has a peculiar value to a person recovering damages for deprivation Property of peculiar value.

thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a wilful wrong-doer.

N. Y. C. C., Sec. 1874.

Value of  
thing in  
action.

SEC. 3356. For the purpose of estimating damages, the value of a thing in action is presumed [prima facie] to be equal to that of the property to which it entitles its owner.

N. Y. C. C., Sec. 1875.

NOTE.—The words "prima facie" have been inserted in the text of the New York Civil Code, to avoid the doubt as between conclusive and prima facie presumptions.

Damages  
allowed in  
this chapter,  
exclusive of  
others.

SEC. 3357. The damages prescribed by this chapter are exclusive of exemplary damages and interest, except where those are expressly mentioned.

N. Y. C. C., Sec. 1876.

Limitation  
of damages.

SEC. 3358. Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on *Exemplary Damages* and *Penal Damages*, and in Secs. 3329, 3339 and 3340.

This is an established principle of equity (*Skinner vs. White*, 17 Johns., 357; rev'g S. C., 2 Johns. Ch., 526), which, since the union of law and equity, should be recognized as a rule of damages. See a decision upon a similar question in *Russell vs. Roberts*, 3 E. D. Smith, 313.

N. Y. C. C., Sec. 1877.

Damages to  
be reason-  
able.

SEC. 3359. Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.

*James vs. Morgan*, 2 Levinz, 111; *Thornborow vs. Whitmore*, 2 Ld. Raym., 1164. In the first case, the defendant had agreed to pay, for a horse sold to him, a farthing for his first shoe nail, two farthings for the second, four for the third, and so on, for the thirty-two nails in the horse's shoes. This, of course, amounted to many thousand pounds sterling, for which the plaintiff sued. But the Court directed the jury to assess the damages at the actual value of the horse, which was found to be eight pounds. In the latter case, a somewhat similar bargain was entered into, the dam-

ages claimed being an enormous sum. The action was sustained on demurrer, and it appears that the Court was, at first, about to give judgment for the whole sum demanded; but an *amicus curie* mentioning the case of James vs. Morgan, the action was settled, under an intimation of the Court, by the repayment of the consideration received for the contract (2s. 6d.), and costs.

N. Y. C. C., Sec. 1878.

SEC. 3360. When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.

Nominal  
damages.

N. Y. C. C., Sec. 1879.

## TITLE III.

### SPECIFIC AND PREVENTIVE RELIEF.

#### CHAPTER I. GENERAL PRINCIPLES.

##### II. SPECIFIC RELIEF.

##### III. PREVENTIVE RELIEF.

#### CHAPTER I.

##### GENERAL PRINCIPLES.

SECTION 3366. Specific relief, etc., when allowed.

3367. Specific relief, how given.

3368. Preventive relief, how given.

3369. Not to enforce penalty, etc.

SEC. 3366. Specific or preventive relief may be given in the cases specified in this Title, and in no others.

Specific  
relief, etc.,  
when  
allowed.

N. Y. C. C., Sec. 1880.

SEC. 3367. Specific relief is given—

1. By taking possession of a thing, and delivering it to a claimant.

2. By compelling a party himself to do that which ought to be done; or,

3. By declaring and determining the rights of parties, otherwise than by an award of damages.

Specific  
relief, how  
given.

The first includes the ordinary remedies in the common law actions of ejectment and replevin, or, as they may be called under the Code, actions for land and actions for chattels.

The second includes the specific performance of contracts, the delivery of things wrongfully detained, the surrender of instruments to be cancelled, etc.

The third includes all cases in which a right is determined, without ulterior measures. Thus a contract may be declared void, although the instrument containing it is lost; a judgment may be annulled for fraud; the occupant of land may be declared to have a good title as against a claimant who does not himself sue, etc.

N. Y. C. C., Sec. 1881.

Preventive  
relief, how  
given.

SEC. 3368. Preventive relief is given by prohibiting a party from doing that which ought not to be done.

N. Y. C. C., Sec. 1882.

Not to  
enforce  
penalty, etc.

SEC. 3369. Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case.

N. Y. C. C., Sec. 1883.

## CHAPTER II.

### SPECIFIC RELIEF.

#### ARTICLE I. POSSESSION OF REAL PROPERTY.

##### II. POSSESSION OF PERSONAL PROPERTY.

##### III. SPECIFIC PERFORMANCE OF OBLIGATIONS.

##### IV. REVISION OF CONTRACTS.

##### V. RESCISSION OF CONTRACTS.

##### VI. CANCELLATION OF INSTRUMENTS.

#### ARTICLE I.

##### POSSESSION OF REAL PROPERTY.

##### SECTION 3375. Judgment for possession or title.

Judgment  
for posses-  
sion or title.

SEC. 3375. A person entitled to specific real property, by reason either of a perfected title, or of a claim to title which ought to be perfected, may recover the same in the manner prescribed by the CODE OF CIVIL PROCEDURE, either by a judgment for its possession, to be executed by the Sheriff, or by a judgment requiring the other party to perfect the title, and to deliver possession of the property.

N. Y. C. C., Sec. 1884.

NOTE.—See Sec. 1213 upon the same subject. Compare, and expunge one or the other.

## ARTICLE II.

## POSSESSION OF PERSONAL PROPERTY.

SECTION 3379. Judgment for delivery.

3380. When holder may be compelled to deliver.

SEC. 3379. A person entitled to the immediate possession of specific personal property may recover the same in the manner provided by the CODE OF CIVIL PROCEDURE.

Judgment  
for delivery.

N. Y. C. C., Sec. 1885.

SEC. 3380. Any person having the possession or control of a particular article of personal property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in either of the following cases:

When holder  
may be com-  
pelled to  
deliver.

1. When the thing claimed is held subject to an express trust in favor of the claimant.
2. When pecuniary compensation would not afford adequate relief for the loss of the thing claimed; or,
3. When it would be extremely difficult to ascertain the actual damage caused by its loss.

This section is intended to provide for the relief granted by Courts of equity in the cases specified. The ordinary remedy in an action for chattels may be evaded by any one who has sufficient means to pay their value, by the exercise of a little ingenuity. Accordingly, Courts of equity have long intervened to compel a wrong-doer *himself* to deliver up the things detained by him.

It will be observed that this remedy is not confined to cases of *wrongful* possession. It may often happen that one who holds a thing in trust may secretly design to make a wrongful disposition of it, and that the owner may have an intimation or suspicion of this design, but no legal evidence of it. A demand before suit might lead to a sudden disposition of the thing, and result in its total loss. The owner ought, therefore, to be allowed to sue without a prior demand, subject to the discretion of the Court as to costs, if it appears that he has made unnecessary litigation (see *Bruce vs. Tilson*, 25 N. Y., 194). But the section is so restricted as not to include the case of a thing agreed to be sold.

The inadequacy of compensation in damages is the true test of a plaintiff's right to this special relief (*North vs. Great Northern Railw. Co.*, 2 Giff. 69). Thus freight cars for use upon a railway were decreed to be delivered up, on the ground that similar cars could not be bought ready made, and that compensation in damages would not cover the loss which would be caused by delay (*id.*). It is not, therefore, deemed advisable to attempt any enumeration, in the text of the Code, of the articles which may be recovered by this process. There would be little danger of injustice being done, if this remedy should be more widely applied. A summary of the principal cases in which a specific delivery has been enforced, may however be useful.

Courts of equity have compelled the delivery of old and rare paintings (*Lowther vs. Lowther*, 13 Ves., 95), of

family paintings (*Hunt vs. Moultrie*, 1 Bosw., 531; *aff'd* in Ct. of Appeals), of an ancient altar piece in silver, with a Greek inscription (*Somerset vs. Cookson*, 3 P. Wms., 369), of a gold snuff box (*Fells vs. Reed*, 3 Ves., 70), of heir looms (*Macclesfield vs. Davis*, 3 Ves. & B., 18; *Pusey vs. Pusey*, 1 Vern., 273), of family plate (*Geoffry vs. Davis*, Cary, 34), of jewels (*Saville vs. Tankred*, 1 Ves. Sr., 101; *Belt. Supp.*, 70; *Young vs. Eurrel*, Cary, 54), of farm stock (*Nutbrown vs. Thornton*, 10 Ves., 159), of masonic regalia (*Lloyd vs. Learing*, 6 Ves., 773), of mortgage deeds (*Jackson vs. Butler*, 2 Atk., 306; *Knyo vs. Moore*, 1 Sim. & S., 61), of books of account (*Evans vs. Van Hall*, Clarke, 26; *Lingan vs. Simpson*, 1 Sim. & S., 600), and, in slave States, of particular slaves (*Hall vs. Clark*, 12 Smc. & N., 189; *Butler vs. Hicks*, 11 id., 79; *Murphy vs. Clark*, 1 id., 221; *Dudley vs. Mallory*, 4 Geo., 52; *Sims vs. Shelton*, 2 Strobb. Eq., 221; *Ellis vs. Commander*, 1 id., 188; *Sarter vs. Gordon*, 2 Hill's Ch., 121; *Lofton vs. Espy*, 4 Yerg., 84; 10 id., 30; *Williams vs. Howard*, 3 Murph., 74; *Young vs. Burton*, 1 McMull. Eq., 256). In *Dowling vs. Betjeman*, (2 Johns. & Hem., 544), the Court asserted its right to order the specific delivery of a new painting, upon the application of the artist himself, but the plaintiff in that case having put a valuation on the painting, this was held to show that compensation in damages would be sufficient relief.

N. Y. C. C., Sec. 1886.

### ARTICLE III.

#### SPECIFIC PERFORMANCE OF OBLIGATIONS.

SECTION 3384. In what cases compelled.

3385. Remedy mutual.

3386. No remedy unless mutual.

3387. Distinction between real and personal property.

3388. Contract signed by one party only, may be enforced by other.

3389. Liquidation of damages not a bar to specific performance.

3390. What cannot be specifically enforced.

3391. What parties cannot be compelled to perform.

3392. What parties cannot have specific performance in their favor.

3393. Specific performance not required when oppressive.

3394. Agreement to sell property by one who has no title.

3395. Relief against parties claiming under person bound to perform.

In what  
cases com-  
pelled.

Sec. 3384. Except as otherwise provided in this article, the specific performance of an obligation may be compelled—

1. When the act to be done is in the performance, wholly or partly, of an express trust.

2. When the act to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.

3. When it would be extremely difficult to ascertain

the actual damage caused by the non-performance of the act to be done; or,

4. When it has been expressly agreed, in writing, between the parties to the contract, that specific performance thereof may be required by either party, or that damages shall not be considered adequate relief.

The word "obligation" is used, because some obligations created by operation of law may be enforced in this manner. It includes an award, which may be specifically enforced (*Bouck vs. Wilber*, 4 Johns. Ch., 405). The obligation must be a subsisting one (*Arnoux vs. Homans*, 25 How. Pr., 427).

Thus, a trustee who has wrongfully disposed of stock may be compelled to restore the same amount of stock (*Forrest vs. Elwos*, 4 Ves., 497). So the specific delivery of a common article of merchandise will be enforced, when held under a trust (*Pooley vs. Budd*, 14 Beav., 34; *Mechanics' Bank vs. Seton*, 1 Peters, 299; *M'Gowin vs. Remington*, 12 Penn. St., 56).

Though in most cases the act which is sought to be specifically enforced is a transfer of property, the jurisdiction is not confined to that class of cases. The Courts have thus enforced an agreement to insure (*Taylor vs. Merchants' Fire Ins. Co.*, 9 How. [U. S.], 405; *Carpenter vs. Mutual Ins. Co.*, 4 Sandf. Ch., 408; *Neville vs. Merchants' Ins. Co.*, 19 Ohio, 452), to indorse a note (see *Watkins vs. Maule*, 2 Jac. & W., 242), to form a partnership (*Buxton vs. Lister*, 3 Atk., 385; *England vs. Curling*, 3 Beav., 129; *Birchett vs. Bolling*, 5 Munf., 442; *Anon.*, 2 Ves. Sr., 629), to discharge a judgment (*Phillips vs. Berger*, 8 Barb., 527; 2 id., 609), to release a mortgage (*Malins vs. Brown*, 4 N. Y., 403), to improve land (*Stuyvesant vs. Mayor*, etc., of New York, 11 Paige, 414), to build an archway (*Stover vs. Gt. Western Railw. Co.*, 2 You. & Coll. Ch., 43), etc. The nature of the property affected, whether real or personal, is not decisive of the right to specific performance, which depends entirely upon the inadequacy of damages to compensate the injured party (*Story Eq. Jur.*, Sec. 717; see *Cathcart vs. Robinson*, 5 Peters, 264; *Adderley vs. Dixon*, 1 Sim. & S., 607; *Harnett vs. Yielding*, 2 Sch. & Lef., 549; *Dalsell vs. Crawford*, 1 Pars. Sel. Eq. Cas., 27).

*Faleke vs. Gray*, 4 Drewry, 651; 5 Jur. [N. S.], 645. Contracts for the sale of chattels of singular value (ib.), or of stock in a corporation (*Cheale vs. Kenward*, 5 De G. & J., 27; *Shaw vs. Fisher*, 5 De G., M. & G., 596; *Duncuft vs. Albrecht*, 12 Sim., 189), may be specifically enforced.

As to the fourth subdivision, there is no reported decision upon this proposition, but in these days, when a judgment for damages affords such very unsatisfactory relief in many cases, there seems much reason for allowing parties to enter into such a stipulation.

N. Y. C. C., Sec. 1837.

**SEC. 3385.** When either of the parties to an obligation is entitled to a specific performance thereof, according to the provisions of the last section, the other party is also entitled to it, though not within those provisions.

Remedy mutual.

*Story Eq. Jur.*, Sec. 723; *Phillips vs. Berger*, 8 Barb., 527; *Schroeppel vs. Hopper*, 40 id., 425; *Withy vs. Cottle*, 1 Sim. & S., 174; *Turn. & Russ.*, 78; see *Crary vs. Smith*, 2 N. Y., 60.

N. Y. C. C., Sec. 1838.

No remedy  
unless  
mutual.

SEC. 3386. Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.

Flight vs. Bolland, 4 Russ., 298; Hargrave vs. Hargrave, 12 Beav., 411; Peto vs. Brighton, etc., Railw. Co., 1 Hem. & Mil., 468; Pickering vs. Bp. of Ely, 2 Y. & Coll. Ch., 249.

See Dyer vs. Hargrave, 10 Ves., 406; Shackleton vs. Sutcliffe, 1 De Gex & Sm., 609.

N. Y. C. C., Sec. 1889.

Distinction  
between real  
and personal  
property.

SEC. 3387. It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved.

This rule seems to be the one upon which the Courts have generally, if not uniformly, acted. There are so few cases in which a refusal to convey land can be adequately compensated by damages, that it is usually stated in broad terms that specific performance can always be required in respect to contracts for the sale of land, but this is not strictly correct.

N. Y. C. C., Sec. 1890.

Contract  
signed by  
one party  
only, may  
be enforced  
by other.

SEC. 3388. A party, who has signed a written contract, may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance.

Story Eq. Jur., Sec., 736 a; Woodward vs. Harris, 3 Sandf., 272; Matter of Hunter, 1 Edw., 1; Clason vs. Bailey, 14 Johns., 484; McCrea vs. Purmort, 16 Wend., 460; Ormond vs. Anderson, 2 Ball & B., 370; Western vs. Russell, 3 Ves. & B., 192.

N. Y. C. C., Sec. 1891.

Liquidation  
of damages  
not a bar  
to specific  
performance

SEC. 3389. A contract otherwise proper to be specifically enforced, may be thus enforced, though a penalty is imposed, or the damages are liquidated for its breach, and the party in default is willing to pay the same.

Story Eq. Jur., Secs. 715, 751; Logan vs. Wienholt, 1 Cl. & F., 611; 7 Bligh [N. S.], 1, 49; Dewey vs. Watson, 1 Gray, 414; Plunkett vs. Meth. Ch., etc., 3 Cush., 566; Easton vs. Kellogg, 4 Pick., 1; Chilliner vs. Chilliner, 3 Ves., 523; Howard vs. Hopkyns, 2 Atk., 321; see Fisher vs. Shaw, 42 Me., 32.



Hull vs. Sturdivant, 46 Me., 34 ; Hooker vs. Pyncheon, 8 Gray, 550 ; see Coles vs. Sims, 5 De G., M. & G., 9 ; Giles vs. Hart, 5 Jur. [N. S.], 1381 ; Nicholls vs. Stretton, 7 Beav., 42. This point was involved in Viele vs. Troy & Boston R. R., 20 N. Y., 184.

N. Y. C. C., Sec. 1892.

SEC. 3390. The following obligations cannot be specifically enforced :

What cannot be specifically enforced.

1. An obligation to render personal service.
2. An obligation to employ another in personal service.
3. An agreement to submit a controversy to arbitration.
4. An agreement to perform an act, which the party has not power lawfully to perform when required to do so.
5. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person ; or,
6. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

N. Y. C. C., Sec. 1893.

SEC. 3391. Specific performance cannot be enforced against a party to a contract, in any of the following cases :

What parties cannot be compelled to perform.

1. If he has not received an adequate consideration for the contract.
2. If it is not, as to him, just and reasonable.
3. If his assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled ; or,
4. If his assent was given under the influence of mistake, misapprehension or surprise, except that where the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced.

N. Y. C. C., Sec. 1894.

SEC. 3392. Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of

What parties cannot have specific performance in their favor.

being fully compensated; in which case specific performance may be compelled, upon full compensation being made for the default.

N. Y. C. C., Sec. 1895.

Specific performance not required when oppressive.

SEC. 3393. Specific performance cannot be compelled when it would operate more harshly upon the party required to perform, than its refusal would operate upon the party seeking it.

N. Y. C. C., Sec. 1896.

Agreement to sell property by one who has no title.

SEC. 3394. An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt.

N. Y. C. C., Sec. 1897.

Relief against parties claiming under person bound to perform.

SEC. 3395. Whenever an obligation in respect to real property would be specifically enforced against a particular person, it may be in like manner enforced against any other person claiming under him by a title created subsequently to the obligation, except a purchaser or encumbrancer in good faith and for value, and except, also, that any such person may exonerate himself by conveying all his estate to the person entitled to enforce the obligation.

N. Y. C. C., Sec. 1898.

#### ARTICLE IV.

##### REVISION OF CONTRACTS.

SECTION 3399. When contract may be revised.

3400. Presumption as to intent of parties.

3401. Principles of revision.

3402. Enforcement of revised contract.

When contract may be revised.

SEC. 3399. When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

N. Y. C. C., Sec. 1899.

SEC. 3400. For the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement.

Presumption  
as to intent  
of parties.

N. Y. C. C., Sec. 1900.

SEC. 3401. In revising a written instrument, the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

Principles  
of revision

N. Y. C. C., Sec. 1901.

SEC. 3402. A contract may be first revised and then specifically enforced [either in the same or separate actions].

Enforcement  
of revised  
contract.

N. Y. C. C., Sec. 1902.

NOTE.—The words in brackets are added to the text of the New York Civil Code.

## ARTICLE V.

### RESCISSION OF CONTRACTS.

SECTION 3406. When rescission may be adjudged.

3407. Rescission for mistake.

3408. Court may require party rescinding to do equity.

SEC. 3406. The rescission of a written contract may be adjudged, on the application of a party aggrieved—

When rescis-  
sion may be  
adjudged.

1. In any of the cases mentioned in Sec. 1689; or,
2. Where the contract is unlawful, for causes not apparent upon its face, and the parties were not equally in fault; or,
3. When the public interest will be prejudiced by permitting it to stand.

It will be observed that this section provides only for a judgment of rescission, without cancellation. Its scope is therefore properly broader than it would be in the latter case. It may be desirable to have a conclusive adjudication upon the validity of a contract, in cases where there is not sufficient ground for further interference. The discretion of the Court as to costs is a sufficient check upon frivolous actions of this nature.

Only the injured party, or those claiming under him, can impeach a contract on account of his want of consent. (*Jackson vs. Eaton*, 20 Johns., 478.) Of course a party committing a fraud cannot have the contract set aside on that ground.

N. Y. C. C., Sec. 1903.

NOTE.—See Secs. 1115, 3307 and 1689. Examine all together.

Rescission  
for mistake.

SEC. 3407. Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

N. Y. C. C., Sec. 1904.

Court may  
require par-  
ty rescinding  
to do equity.

SEC. 3408. On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

N. Y. C. C., Sec. 1905.

NOTE.—The words "for any other cause than usury" stricken out.

## ARTICLE VI.

### CANCELLATION OF INSTRUMENTS.

SECTION 3412. When cancellation may be ordered.

3413. Instrument obviously void.

3414. Cancellation in part.

When can-  
cancellation  
may be  
ordered.

SEC. 3412. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or cancelled.

N. Y. C. C., Sec. 1906.

Instrument  
obviously  
void.

SEC. 3413. An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury, within the provisions of the last section.

N. Y. C. C., Sec. 1907.

Cancellation  
in part.

SEC. 3414. Where an instrument is evidence of different rights or obligations, it may be cancelled in part, and allowed to stand for the residue.

Thus an indorser of a bill may be entitled to have his indorsement cancelled in a case which would not entitle the drawer to any relief. And an instrument might be partially valid against a party entitled to cancel it in part; although such cases are doubtless rare.

N. Y. C. C., Sec. 1908.

## CHAPTER III.

## PREVENTIVE RELIEF.

SECTION 3420. Preventive relief, how granted.

3421. Provisional injunctions.

3422. Injunction, when allowed.

3423. Injunction, when not allowed.

SEC. 3420. Preventive relief is granted by injunction, Preventive relief, how granted.  
provisional or final.

N. Y. C. C., Sec. 1909.

SEC. 3421. Provisional injunctions are regulated by Provisional injunctions.  
the CODE OF CIVIL PROCEDURE.

N. Y. C. C., Sec. 1910.

SEC. 3422. Except where otherwise provided by this Title, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant— Injunction, when allowed.

1. Where pecuniary compensation would not afford adequate relief.

2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief.

3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or,

4. Where the obligation arises from a trust.

N. Y. C. C., Sec. 1911.

SEC. 3423. An injunction cannot be granted— Injunction, when not allowed.

1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded; unless such restraint is necessary to prevent a multiplicity of such proceedings.

2. To stay proceedings in a Court of the United States.

3. To stay proceedings, in another State, upon a judgment of a Court of that State.

4. To prevent the execution of a public statute, by officers of the law, for the public benefit.

5. To prevent the breach of a contract, the performance of which would not be specifically enforced.

6. To prevent an injury to the person, character or personal relations of the applicant, not amounting to a

nuisance ; except that in an action for divorce, an injunction may be granted to prevent interference with a wife or child.

7. To prevent the exercise of a public or private office, in a lawful manner, by the person in possession.

8. To prevent a legislative act by a municipal corporation ; or,

9. Where relief, equally efficacious, can be obtained by any other usual mode of proceeding, except in case of breach of trust.

N. Y. C. C., Sec. 1912.

## PART II.

### SPECIAL RELATIONS OF DEBTOR AND CREDITOR.

#### TITLE I. GENERAL PRINCIPLES.

##### II. FRAUDULENT INSTRUMENTS AND TRANSFERS.

##### III. ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

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### TITLE I.

#### GENERAL PRINCIPLES.

##### SECTION 3429. Who is a debtor.

3430. Who is a creditor.

3431. Contracts of debtor are valid.

3432. Payments in preference.

3433. Relative rights of different creditors.

SEC. 3429. A debtor, within the meaning of this Title, is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent.

Who is a debtor.

N. Y. C. C., Sec. 1913.

SEC. 3430. A creditor, within the meaning of this Title, is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money.

Who is a creditor.

N. Y. C. C., Sec. 1914.

SEC. 3431. In the absence of fraud, every contract of a debtor is valid against all his creditors, existing or subsequent, who have not acquired a lien on the property affected by such contract.

Contracts of debtor are valid.

N. Y. C. C., Sec. 1915.

SEC. 3432. A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another.

Payments in preference.

N. Y. C. C., Sec. 1916.

Relative  
rights of  
different  
creditors.

SEC. 3433. Where a creditor is entitled to resort to each of several funds for the satisfaction of his claim, and another person has an interest in, or is entitled as a creditor to resort to, some but not all of them, the latter may require the former to seek satisfaction from those funds to which the latter has no such claim, so far as it can be done without impairing the right of the former to complete satisfaction, and without doing injustice to third persons.

N. Y. C. C., Sec. 1917.

## TITLE II.

### FRAUDULENT INSTRUMENTS AND TRANSFERS.

SECTION 3439. Transfers, etc., with intent to defraud creditors.

3440. Certain transfers presumed fraudulent.

3441. Rights of purchasers and mortgagees.

3442. Creditor's right must be judicially ascertained.

3443. Question of fraud, how determined.

Transfers,  
etc., with  
intent to  
defraud  
creditors.

SEC. 3439. Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

N. Y. C. C., Sec. 1918; "Fraudulent Conveyances and Contracts," Sec. 20.

NOTE.—"Creditors" ought to be named, also, in Sec. 1227, with "purchasers" and "encumbrancers," as that section refers to "Fraudulent Transfers of Real Property." That section (1227) is an expression of Sec. 1 of the Act cited (Fraudulent Conveyances and Contracts). The term "creditors" is necessary to make that Title complete in itself. It would be an instance of duplicating a single word or line of the law to give completeness to an important subject, without disturbing the phraseology of one of the oldest and most thoroughly adjudicated sections. A section (1227 a) applying this section to transfers of real property, would, perhaps, accomplish the object best. Logically, the subjects of this section belong to the Titles on *Transfers of Real Property, Sales of Personal Property, and Obligations.*



Sec. 3440. Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a contract of bottomry or respondentia, is [conclusively] presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer.

Certain transfers presumed fraudulent.

N. Y. C. C., Sec. 1919.

NOTE.—The word “conclusively,” in brackets, is inserted in the text of the New York Civil Code to conform with the requirement of our statute of Frauds, Sec. 15 (Hit. Dig., Sec. 3159). The following section from the New York Civil Code is retained as a note, and may be made a part of the text, if “conclusively” should be stricken from the above section :

Sec. 1920. The presumption declared by the last section may be repelled by showing that the transfer was made in good faith and without intent to defraud.

See note to preceding section ; also, see Sec. —, with note, in Title on *Personal Mortgage*.

Sec. 3441. The provisions of this Title do not affect the rights of a purchaser or encumbrancer, in good faith and for value.

Rights of purchasers and mortgagees.

N. Y. C. C., Sec. 1921.

Sec. 3442. A creditor can avoid the act or obligation of his debtor for fraud, only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation.

Creditor's right must be judicially ascertained.

N. Y. C. C., Sec. 1922.

Sec. 3443. In all cases arising under this Title, or under Sec. 1227 of this Code, the question of fraudulent intent is one of fact, and not of law ; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration.

Question of fraud, how determined.

N. Y. C. C., Sec. 1923.

## TITLE III.

## ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. .

NOTE.—It is thought best to submit this Title, from the New York Code, to the Legislature. There *ought* to be some well ordered system by which a *debtor* can make an honorable distribution of his assets among his creditors, without the intervention of the Bankrupt Law. Of course such a State law could not prevent creditors carrying the assets into bankruptcy if they should doubt the intent of the assignment or the fitness of the assignee to execute it. Secs. 641, 642 and 643 of the Penal Code of New York ought to be inserted in our own Code. The notes to these sections in the New York Penal Code fully review the whole question.

## SECTION 3449. When debtor may execute assignment.

- 3450. Insolvency, what.
- 3451. Certain transfers not affected.
- 3452. What debts may be secured.
- 3453. What preferences may be given.
- 3454. Preference must be absolute.
- 3455. Certain rights not affected by preferences in assignment.
- 3456. Joint and separate debts.
- 3457. Assignment, when void.
- 3458. The instrument of assignment.
- 3459. Compliance with provisions of last section necessary to validity of assignment.
- 3460. Assignee takes, subject to rights of third parties.
- 3461. Inventory required.
- 3462. Verification of inventory.
- 3463. Recording assignment and filing inventory.
- 3464. Same.
- 3465. Effect of omitting to record.
- 3466. Assignment of real property.
- 3467. Bond of assignees.
- 3468. Conditions of disposal and conversion.
- 3469. Accountings.
- 3470. Property exempt.
- 3471. Compensation.
- 3472. Assignees protected for acts done in good faith.
- 3473. Assent of creditor necessary to modification of assignment.

When debtor  
may execute  
assignment.

SEC. 3449. An insolvent debtor may, in good faith, execute an assignment of property to one or more assignees, in trust for the satisfaction of his creditors, in conformity to the provisions of this chapter; subject, however, to the provisions of this Code relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations or by other specific classes of persons.

The Commissioners have already reported, in Sec. 643 of the Penal Code, a provision making it a misdemeanor for an insolvent to make an assignment with preferences, except in the cases in which a preference is expressly allowed to be given by law. And they have stated quite fully, in a note to that section, the reasons which led them to recommend restricting so closely the right to make preferential assignments. The provisions of the Penal Code upon the subject are, of course, confined to imposing a punishment for attempting to make an illegal assignment. In the present chapter other provisions are presented in respect to the making of preferential assignments and the settlement of assigned estates.

The course of decision in this State upon the right to give preferences, and the various restrictions which have been imposed upon it, will be found reviewed in the Penal Code, Sec. 643, note.

N. Y. C. C., Sec. 1924.

**SEC. 3450.** A debtor is insolvent, within the meaning of this Title, when he is unable to pay his debts from his own means, as they become due

*Insolvency what.*

See *Herrick vs. Borst*, 4 Hill, 650; *Curtis vs. Leavitt*, 15 N. Y., 9, 199.

Compare also Sec. 1708 of this Code. The definition here given is purposely made more comprehensive than that presented in the section referred to, which relates to stoppage in transit. To bring an assignment within the provisions of this chapter, it is enough that the debtor has become unable to pay. To warrant the exercise of the right of stoppage in transit, he must have "stopped payment." The distinction is warranted by the existing law.

N. Y. C. C., Sec. 1925.

NOTE.—See Sec. 3077 of this Code.

**SEC. 3451.** The provisions of this Title do not prevent a person residing in another State or country from making there, in good faith, and without intent to evade the laws of this State, a transfer of property situated within it, nor do they affect the power of a person, although insolvent and within this State, to transfer property to a particular creditor for the purpose of paying or securing the whole or a part of a debt, owing to such creditor, whether in his own right or otherwise.

*Certain transfers no affected.*

*Ackerman vs. Cross*, 40 Barb., 465; *Hall vs. Arnold*, 15 id., 599.

N. Y. C. C., Sec. 1926.

**SEC. 3452.** An assignment for the benefit of creditors may provide for any subsisting liability of the assignor which he might lawfully pay, whether absolute or contingent.

*What debts may be secured.*

N. Y. C. C., Sec. 1927.

What preferences may be given.

SEC. 3453. Except as otherwise specially provided by statute, an assignment by an insolvent debtor, for the benefit of creditors, may give a preference to one or more creditors or classes of creditors, in the following cases, and in no others:

1. Judgments may be preferred to debts not in judgment.

2. Debts which are liens or charges upon the assigned property, or upon some part of it, may be preferred to debts which are not such liens or charges.

3. Debts for money or other property lent without interest, may be preferred to debts for money lent upon interest, or for property sold.

4. Debts due from the assignor by virtue of a trust, may be preferred to debts which are not thus due; and,

5. Debts for personal services performed within six months next before the assignment, may, to an extent not exceeding one hundred dollars to any one person, be preferred to other debts not within any of the preceding classes.

N. Y. C. C., Sec. 1928.

Preference must be absolute.

SEC. 3454. A preference, in an assignment for the benefit of creditors, can only be given absolutely, and without reserving any power of revocation.

N. Y. C. C., Sec. 1929.

Certain rights not affected by preferences in assignment.

SEC. 3455. No provision in an assignment, giving a preference to a creditor, can affect or impair any right of another creditor to priority of payment, whether created by law, or arising from an obligation or transaction of the parties.

N. Y. C. C., Sec. 1930.

Joint and separate debts.

SEC. 3456. Joint, or joint and several debtors, can prefer their joint creditors only out of joint property; and can prefer the individual creditors of each, only out of the separate property of each.

This provision is partly new. Compare Kirby vs. Schoemaker, 3 Barb. Ch., 46; Nicholson vs. Leavitt, 4 Sandf., 252; Jackson vs. Cornell, 1 Sandf. Ch., 348; Van Roesum vs. Walker, 11 Barb., 237; Wilson vs. Robertson, 21 N. Y., 587; 19 How. Pr., 350; Smith vs. Howard, 20 How Pr., 121; Cox vs. Platt, 32 Barb., 126; 19 How. Pr., 121; Turner vs. Jaycox, 40 Barb., 164; Scott vs. Guthrie, 25 How. Pr., 481, 512.

N. Y. C. C., Sec. 1931.

Sec. 3457. An assignment for the benefit of creditors is void against any creditor of the assignor not assenting thereto, in the following cases : Assignment,  
when void

1. If it gives an unlawful preference of one debt or class of debts over another.

2. If it gives a preference dependent upon any condition or contingency, or with any power of revocation reserved.

3. If it tends to coerce any creditor to release or compromise his demand.

4. If it provides for the payment of any claim known to the assignor to be false or fraudulent ; or for the payment of more upon any claim than is justly due from the assignor.

5. If it reserves any interest in the assigned property, or in any part thereof, to the assignor or for his benefit, before all his existing debts are paid.

6. If it confers upon the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property to the purposes of the trust.

7. If it exempts him from liability for neglect of duty or misconduct ; or,

8. If it violates Sec. 3456 of this Code.

N. Y. C. C., Sec. 1932.

Sec. 3458. An assignment for the benefit of creditors must be in writing, subscribed by the assignor, or by his agent thereto authorized in writing. It must be acknowledged, or proved and certified, in the mode prescribed by the chapter on *Recording Transfers of Real Property*, and recorded as required by Secs. 3463 and 3464 ; but recording in one county constitutes a compliance with the following section. The instrument  
of  
assignment.

N. Y. C. C., Sec. 1933.

NOTE.—The words “ and if it embraces a fee or freehold estate in real property it must be *sealed* ” are stricken out, as seals are abolished. The section is also modified so that assignment will not take effect until recorded.

Sec. 3459. Unless the provisions of the last section are complied with, an assignment for the benefit of creditors is void against every creditor of the assignor not assenting thereto. Compliance  
with pro-  
visions of  
last section  
necessary to  
validity of  
assignment.

N. Y. C. C., Sec. 1934.

Assignee  
takes, sub-  
ject to rights  
of third  
parties.

SEC. 3460. An assignee for the benefit of creditors is not to be regarded as a purchaser for value, and has no greater rights than his assignor had, in respect to things in action transferred by the assignment.

*Curtis vs. Leavitt*, 15 N. Y., 195; *Van Heusen vs. Radcliff*, 17 id., 580; *Griffin vs. Marquardt*, id., 28; *Leger vs. Bonaffe*, 2 Barb., 475; *Warren vs. Fenn*, 28 id., 333; *Marine and Fire Ins. Bank vs. Jauncey*, 1 id., 456; *Matter of Howe*, 1 Paige, 125; *Mead vs. Phillips*, 1 Sandf. Ch., 83; *Bliss vs. Cottle*, 32 Barb., 322; *Reed vs. Sands*, 37 id., 185; *Maas vs. Goodman*, 2 Hilt., 275; *Schieffelin vs. Hawkins*, 14 Abb. Pr., 112.

N. Y. C. C., Sec. 1935.

Inventory,  
required.

SEC. 3461. Within twenty days after an assignment is made for the benefit of creditors, the assignor must make and file, in the manner prescribed by Sec. 3463, a full and true inventory, showing—

1. All the creditors of the assignor.
2. The place of residence of each creditor, if known to the assignor, or if not known, that fact must be stated.
3. The sum owing to each creditor and the nature of each debt or liability, whether arising on written security, account or otherwise.
4. The true consideration of the liability in each case, and the place where it arose.
5. Every existing judgment, mortgage or other security for the payment of any debt or liability of the assignor.
6. All property of the assignor at the date of the assignment, which is exempt by law from execution; and,
7. All of the assignor's property at the date of the assignment, both real and personal, of every kind, not so exempt, and the encumbrances existing thereon, and all vouchers and securities relating thereto, and the value of such property according to the best knowledge of the assignor.

N. Y. C. C., Sec. 1936.

Verification  
of inventory.

SEC. 3462. An affidavit must be made by every person executing an assignment for the benefit of creditors, to be annexed to and filed with the inventory mentioned in the last section, to the effect that the same is in all respects just and true, according to the best of such assignor's knowledge and belief.

N. Y. C. C., Sec. 1937.

SEC. 3463. An assignment for the benefit of creditors must be recorded, and the inventory required by Sec. 3461 filed with the County Recorder of the county in which the assignor resided at the date of the assignment; or, if he did not then reside in this State, with the Recorder of the county in which his principal place of business was then situated; or, if he had not then a residence or place of business in this State, with the Recorder of the county in which the principal part of the assigned property was then situated.

Recording  
assignment  
and filing  
inventory.

N. Y. C. C., Sec. 1938.

SEC. 3464. If an assignment for the benefit of creditors is executed by more than one assignor, it may be recorded, and a copy of the inventory required by Sec. 3461 may be filed with the Recorder of the county in which any of the assignors resided at its date, or in which any of them, not then residing in this State, had then a place of business.

Same.

N. Y. C. C., Sec. 1939.

SEC. 3465. An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and encumbrancers in good faith and for value, unless it is recorded, and unless the inventory required by Sec. 3461 is not filed, pursuant to Sec. 3463, within twenty days after the date of the assignment.

Effect of  
omitting to  
record.

N. Y. C. C., Sec. 1940—modified.

SEC. 3466. Where an assignment for the benefit of creditors embraces real property, it is subject to the provisions of Art. IV of the chapter on *Recording Transfers*, as well as to those of this Title.

Assignment  
of real  
property.

N. Y. C. C., Sec. 1941.

SEC. 3467. Within thirty days after the date of an assignment for the benefit of creditors, the assignee must enter into a bond to the people of this State, in such amount as may be fixed by the County Judge of the county in which the original inventory is filed, with sufficient sureties, to be approved by such Judge, and conditioned for the faithful discharge of the trust, and the due accounting for all moneys received by the assignee, which bond must be filed in the same office with the original inventory.

Bond of  
assignee.

N. Y. C. C., Sec. 1942.

Conditions of  
disposal and  
conversion.

**SEC. 3468.** Until the inventory and affidavit required by Secs. 3461 and 3462 have been made and filed, and the assignee has given a bond as required by the last section, the assignee for the benefit of creditors has no authority to dispose of the estate or convert it to the purposes of the trust.

N. Y. C. C., Sec. 1943.

Accountings

**SEC. 3469.** After six months from the date of an assignment for the benefit of creditors, the assignee may be required, on the petition of any creditor, to account before the County Judge of the county where the accompanying inventory was filed, in the manner prescribed by the CODE OF CIVIL PROCEDURE.

The mode of proceeding is left to be regulated by the Code of Civil Procedure.

N. Y. C. C., Sec. 1944.

Property  
exempt.

**SEC. 3470.** Property exempt from execution, and insurances upon the life of the assignor, do not pass to the assignee by a general assignment for the benefit of creditors, unless the instrument specially mentions them, and declares an intention that they should pass thereby.

N. Y. C. C., Sec. 1945.

Compensa-  
tion.

**SEC. 3471.** In the absence of any provision in the assignment to the contrary, an assignee for the benefit of creditors is entitled to the same commissions as are allowed by law to executors and guardians; but the assignment cannot grant more, and may restrict the commissions to a less amount, or deny them altogether.

N. Y. C. C., Sec. 1946.

Assignees  
protected for  
acts done in  
good faith.

**SEC. 3472.** An assignee for the benefit of creditors is not to be held liable for his acts, done in good faith, in the execution of the trust, merely for the reason that the assignment is afterward adjudged void.

N. Y. C. C., Sec. 1947.

Assent of  
creditor nec-  
essary to  
modification  
of assign-  
ment.

**SEC. 3473.** An assignment for the benefit of creditors, which has been executed and recorded so as to transfer the property to the assignee, cannot afterwards be cancelled or modified by the parties thereto, without the consent of every creditor affected thereby.

N. Y. C. C., Sec. 1948.



# PART III.

## NUISANCE.

### TITLE I. GENERAL PRINCIPLES.

#### II. PUBLIC NUISANCES.

#### III. PRIVATE NUISANCES.

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## TITLE I.

### GENERAL PRINCIPLES.

#### SECTION 3479. Nuisance, what.

3480. Public nuisance.

3481. Private nuisance.

3482. What is not deemed a nuisance.

3483. Successive owners.

3484. Abatement does not preclude action.

SEC. 3479. A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either—

Nuisance,  
what.

1. Annoys, injures or endangers the comfort, repose, health or safety of others; or,
2. Offends decency; or,
3. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or,
4. In any way renders other persons insecure in life, or in the use of property.

This definition corresponds with that given of public nuisance, in the Penal Code, Sec. 430, except that it is modified to embrace private nuisance also. Numerous authorities on the different branches of the definition are collected in a note to the section of the Penal Code referred to. See, also, *People vs. Vanderbilt*, 26 N. Y., 287; 25 How. Pr., 139; 38 Barb., 282; *Niagara Falls International Bridge Co. vs. Great Western R. R. Co.*, 39 Barb., 212.

N. Y. C. C., Sec. 1949.

Public  
nuisance.

SEC. 3480. A public nuisance is one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.

N. Y. C. C., Sec. 1950.

Private  
nuisance.

SEC. 3481. Every nuisance not included in the definition of the last section is private.

N. Y. C. C., Sec. 1951.

What is not  
deemed a  
nuisance.

SEC. 3482. Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

N. Y. C. C., Sec. 1952.

Successive  
owners.

SEC. 3483. Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefor in the same manner as the one who first created it.

N. Y. C. C., Sec. 1953.

Abatement  
does not  
preclude  
action.

SEC. 3484. The abatement of a nuisance does not prejudice the right of any person to recover damages for its past existence.

N. Y. C. C., Sec. 1954.

## TITLE II.

### PUBLIC NUISANCES.

SECTION 3490. Lapse of time does not legalize.

3491. Abatement.

3492. When notice is required.

3493. Remedies for public nuisance.

3494. Action.

3495. How abated.

Lapse of  
time does  
not legalize.

SEC. 3490. No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right.

N. Y. C. C., Sec. 1955.

Abatement.

SEC. 3491. The remedies against a public nuisance are :

1. Indictment.
2. A civil action ; or,
3. Abatement.

N. Y. C. C., Sec. 1956.

**SEC. 3492.** The remedy by indictment is regulated by When notice is required.  
the PENAL CODE.

N. Y. C. C., Sec. 1957.

**SEC. 3493.** A private person may maintain an action Remedies for public nuisance.  
for a public nuisance if it is specially injurious to himself,  
but not otherwise.

N. Y. C. C., Sec. 1958.

**SEC. 3494.** A public nuisance may be abated by any Action.  
public body or officer authorized thereto by law.

The powers of various bodies and officers to act in the abatement of nuisances, are, however, to be sought in the statutes conferring them; they are not properly within the scope of the Civil Code.

N. Y. C. C., Sec. 1959.

**SEC. 3495.** Any person may abate a public nuisance How abated.  
which is specially injurious to him, by removing, or, if  
necessary, destroying the thing which constitutes the  
same, without committing a breach of the peace, or doing  
unnecessary injury.

N. Y. C. C., Sec. 1960.

## TITLE III.

### PRIVATE NUISANCES.

**SECTION 3501.** Remedies for private nuisance.

3502. Abatement, when allowed.

3503. When notice is required.

**SEC. 3501.** The remedies against a private nuisance Remedies for private nuisance.  
are—

1. A civil action ; or,
2. Abatement.

N. Y. C. C., Sec. 1961.

Abatement,  
when  
allowed.

Sec. 3502. A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance, without committing a breach of the peace, or doing unnecessary injury.

N. Y. C. C., Sec. 1962.

When notice  
is required.

Sec. 3503. Where a private nuisance results from a mere omission of the wrong-doer, and cannot be abated without entering upon his land, reasonable notice must be given to him before entering to abate it.

N. Y. C. C., Sec. 1963.

## PART IV.

### MAXIMS OF JURISPRUDENCE.

SEC. 3509. The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this Code, but to aid in their just application.

The maxims given in the text are not meant to be mere translations of the Latin originals mentioned in the notes; but such an explanation of them as is supposed to be most just and consonant with our legal system.

It will be observed that those maxims only are presented which have a general application. Such maxims as "*caveat emptor*," "*qui facit per alium*," etc., which apply to sales and agency, more particularly, and others of a like character, are omitted. In respect to such it is thought better to state the proper rules completely in the chapter of the Code relating to the particular topic, than to refer to this Part for any additional principles.

N. Y. C. C., Sec. 1964.

SEC. 3510. When the reason of a rule ceases, so should the rule itself.

"*Cessante ratione legis cessat ipsa lex.*" (Co. Litt., 70 b.; Branch's Maxims, 68; Richards vs. Heather, 1 B. & Ald., 33.)

N. Y. C. C., Sec. 1965.

SEC. 3511. Where the reason is the same, the rule should be the same.

"*Ubi eadem ratio ibi idem jus.*" (Co. Litt., 10 a.; Branch's Max., 64.)

N. Y. C. C., Sec. 1966.

SEC. 3512. One must not change his purpose to the injury of another.

"*Nemo potest mutare consilium suum in alterius injuriam.*" (Dig., 50, 17, 75). The spirit and application of this maxim are examined by Chancellor Kent, in Dash vs. Van Kleeck, 7 Johns., 54, with special reference to retroactive statutes. In Bonati vs. Welsch (24 N. Y., 157, 162), it was held, partly upon the authority of this maxim, that a husband's change of domicile did not affect the rights of property which his wife acquired at her marriage by the law of the place where they were married.

N. Y. C. C., Sec. 1967.

SEC. 3513. Any one may waive the advantage of a law intended solely for his benefit. But a law established for

a public reason cannot be contravened by a private agreement.

*"Quilibet potest renunciare juri pro se introducto."* (Branch's Max., 309.) Compare *"Modus et conventio vincunt legem."*

N. Y. C. C., Sec. 1968.

SEC. 3514. One must so use his own rights as not to infringe upon the rights of another.

*"Sic utere tuo ut alienum non ledas."* (9 Co. Rep., 59; Branch's Max., 160.)

N. Y. C. C., Sec. 1969.

SEC. 3515. He who consents to an act is not wronged by it.

*"Volenti non fit injuria."* (Bracton, fol. 13; Branch's Max., 127; Hartfield vs. Roper, 21 Wend., 629; Corwin vs. N. Y. & Erie R. R. Co., 13 N. Y., 49; Lyon vs. Tallmadge, 1 Johns. Ch., 187; Palmer vs. Lord, 6 Johns. Ch., 101; Lemmon vs. People, 20 N. Y., 628.) *"Nulla injuria est quæ in volentem fiat."* (Dig., 47, 10, 1, 5.)

N. Y. C. C., Sec. 1970.

SEC. 3516. Acquiescence in error takes away the right of objecting to it.

*"Consensus tollit errorem, is a maxim of the common law and the dictate of common sense."* (Rogers vs. Crager, 7 Johns., 611.)

N. Y. C. C., Sec. 1971.

SEC. 3517. No one can take advantage of his own wrong.

*"Nullus commodum capere potest de injuria sua propria."*

N. Y. C. C., Sec. 1972.

SEC. 3518. He who has fraudulently dispossessed himself of a thing may be treated as if he still had possession.

*"Qui dolo denierit possidere, pro possidente damnatur."*

N. Y. C. C., Sec. 1973.

SEC. 3519. He who can and does not forbid that which is done on his behalf, is deemed to have bidden it.

*"Semper qui non prohibet pro se intervenire mandari creditur."*

N. Y. C. C., Sec. 1974.

SEC. 3520. No one should suffer by the act of another.

*"Res inter alios acta alteri nocere non debet."* (See Gelston vs. Hoyt, 13 Johns., 361, 381; Sweet vs. Barney, 23 N. Y., 335, 341; Langdon vs. Astor, 16 N. Y., 9, 31.)

N. Y. C. C., Sec. 1975.

SEC. 3521. He who takes the benefit must bear the burden.

*"Qui sentit commodum, sentire debet et onus."* (Palne vs. Bonney, 6 Abb. Pr., 106; Frost vs. Saratoga Ins. Co., 5 Denio, 158; Bartlett vs. Crozier, 17 Johns., 453; Hendricks vs. Judah, 2 Cai., 25, 28; United Ins. Co. vs. Robinson, id., 280, 283; Matter of Mayor, etc., of New York, 11 Johns., 771.) One who takes an estate in land and enjoys the benefits resulting from his title, must bear the burdens of the encumbrances upon the land and of the covenants that run with it (Denman vs. Prince, 40 Barb., 213; Verplanck vs. Wright, 23 Wend., 506; Priestly vs. Foulds, 2 Scott N. R., 225).

N. Y. C. C., Sec. 1976.

SEC. 3522. One who grants a thing is presumed to grant also whatever is essential to its use.

*"Cuiusque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potest."* (See Sterricker vs. Dickinson, 9 Barb., 518; Troup vs. Harlbut, 10 id., 359.)

N. Y. C. C., Sec. 1977.

SEC. 3523. For every wrong there is a remedy.

*"Ubi jus, ibi remedium."* (Johnstone vs. Sutton, 1 T. R., 312.)

N. Y. C. C., Sec. 1978.

SEC. 3524. Between those who are equally in the right, or equally in the wrong, the law does not interpose.

*"In equali jure melior est conditio possidentis."* (Ontario Bank vs. Worthington, 12 Wend., 601; M'Laughlin vs. Waite, 9 Cow., 674; Graves vs. Delaplaine, 14 Johns., 159.) *"In pari delicto potior est conditio defendentis."* (See Peck vs. Burr, 10 N. Y., 294.)

N. Y. C. C., Sec. 1979.

SEC. 3525. Between rights otherwise equal, the earliest is preferred.

*"Que prior est in tempore potior est in jure."* (See Muir vs. Schenck, 3 Hill, 228; Poillon vs. Martin, 1 Sandf. Ch., 578; Watson vs. Le Row, 6 Barb., 485.)

N. Y. C. C., Sec. 1980.

SEC. 3526. No man is responsible for that which no man can control.

*"Actus Dei facit nemini injuriam."* This is a maxim of the common law with regard to obligations created merely by operation of law; but it has not been considered applicable to contracts. (Tompkins vs. Dudley, 25 N. Y., 170; Harmony vs. Bingham, 12 N. Y., 99; Brown vs. Royal Ins. Co., 1 El. & El., 853.) The Commissioners have proposed, however, to extend this principle to contracts. (See Sec. 727.)

N. Y. C. C., Sec. 1981.

SEC. 3527. The law helps the vigilant, before those who sleep on their rights.

*"Vigilantibus non dormientibus leges subsecunt."* (Tools vs. Cook, 16 How. Pr., 144.)

N. Y. C. C., Sec. 1982.

SEC. 3528. The law respects form less than substance.

Francois' Maxims, No. 13.

N. Y. C. C., Sec. 1983.

SEC. 3529. That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due.

Thus an agreement for a valuable consideration will be treated as actually executed from the period when it ought to have been performed in favor of a person entitled to insist on its performance. On this principle, money agreed or devised to be laid out in land will be treated as real estate; and land contracted or devised to be sold will be treated as money. (Story Eq. Jur., Sec. 64, g.; Adams' Equity, 74.) See, for other illustrations of the maxim, Burch vs. Newberry, 1 Barb., 648, 664; Hasbrouck vs. Paddock, 1 id., 635; Craig vs. Leslie, 3 Wheat., 563; Roosevelt vs. Bank of Niagara, Hopk., 583.

N. Y. C. C., Sec. 1984.

SEC. 3530. That which does not appear to exist is to be regarded as if it did not exist.

*"De non apparentibus et de non existentibus eadem est ratio."* (Johnson vs. Stagg, 2 Johns., 519.)

N. Y. C. C., Sec. 1985.

SEC. 3531. The law never requires impossibilities.

*"Lex non cogit ad impossibilia."* (Co. Litt., 231, b.; Schroeder vs. Hudson River R. R. Co., 5 Duer, 62.) *"Impotentia excusat legem."* (Jackson vs. Sellick, 3 Johns., 271; Jackson vs. Johnson, 5 Cow., 103.)

N. Y. C. C., Sec. 1986.

SEC. 3532. The law neither does nor requires idle acts.

*"Lex non cogit ad vana seu inutilia."* (Boot vs. Franklin, 3 Johns., 210.) *"Lex nil frustra facit."* It is a settled principle, says Chancellor Kent, that a Court will not undertake to exercise a power unless it can exercise it to some purpose. (Huntington vs. Nicoll, 3 Johns., 598.)

N. Y. C. C., Sec. 1987.

SEC. 3533. The law disregards trifles.

*"De minimis non curat lex. Nimia subtilitas in jure reprobatur. Bonæ fidei non convenit de apicibus juris disputare."* (Ulpian, Dig., 17, 1, 29; see Shipman vs. Shafer, 14 Abb. Pr., 456; Matter of Empire City Bank, 18 N. Y., 218.)

N. Y. C. C., Sec. 1988.



**SEC. 3534.** Particular expressions qualify those which are general.

*"In toto jure generi per speciem derogatur et illud potissimum habetur quod ad speciem directum est."* (See *Platt vs. Lott*, 17 N. Y., 478.)

N. Y. C. C., Sec. 1989.

**SEC. 3535.** Contemporaneous exposition is in general the best.

*"Contemporanea expositio est optima et fortissima in lege."* In construing a statute, great regard should be paid to the opinion in respect to it entertained by persons learned in the law at the time of its passage. (*Sedgwick Stat. and Const. Law*, 251; *Dwarris*, 562.)

N. Y. C. C., Sec. 1990.

**SEC. 3536.** The greater contains the less.

*"Omne majus continet in se minus. In eo quod plus est semper inest et minus."* (Dig., 50, 17, 110.) *"Non debet cui plus licet. Quod minus est non licere."* (Ulpian *Gothofredi*, Reg. Juris. Compare Dig., 50, 17, 26-37.) *"Omne majus in se minus complectitur."* (*Kip vs. Brigham*, 6 Johns., 157.)

N. Y. C. C., Sec. 1991.

**SEC. 3537.** Superfluity does not vitiate.

*"Utile per inutile non vitiatur."* (*Rickets vs. Livingston*, 2 Johns. Cas., 101; *Yates' Case*, 4 Johns., 367; *Ogden vs. Barker*, 18 id., 93; *Aylesworth vs. Brown*, 10 Barb., 174.) This maxim has long been familiar to the common law. It has had frequent application in the law of conveyancing, of pleading and of evidence.

N. Y. C. C., Sec. 1992.

**SEC. 3538.** That is certain which can be made certain.

*"Id certum est quod certum reddi potest."* (*Olmsted vs. Loomis*, 9 N. Y., 434; *Hyland vs. Stafford*, 10 Barb., 565; *Ostrander vs. Walter*, 2 Hill, 332.)

N. Y. C. C., Sec. 1993.

**SEC. 3539.** Time does confirm a void act.

*"Quod ab initio non valet in tractu temporis non convalescit. Quod initio vitiosum est non potest tractu temporis convalescere."*

"The general rule is that whenever any contract or conveyance is void, either by a positive law or upon principles of public policy, it is deemed incapable of confirmation upon the maxim, *quod ab initio*," etc. (*Story Eq. Jur.*, Sec. 306; *Vernon's case*, 4 Co. Rep., 2 b.) "No length of time," said Lord Talbot, "will bar a fraud." (*Cas. temp. Talbot*, 73.)

N. Y. C. C., Sec. 1994.

**SEC. 3540.** The incident follows the principal, not the principal the incident.

*Battle vs. Coit*, 26 N. Y., 404. *"Accessorium non ducit sed sequitur suum principale."*

N. Y. C. C., Sec. 1995.

Sec. 3541. An interpretation which gives effect is preferred to one which makes void.

*"Ut res magis valeat quam pereat."* (Langdon vs. Astor, 16 N. Y., 47; Nichols vs. McEwen, 17 id., 25; Laub vs. Buckmiller, id., 627.)

N. Y. C. C., Sec. 1996.

Sec. 3542. Interpretation must be reasonable.

Everything is to have a reasonable construction, and everything necessary to make a rule reasonable is implied. (Jones vs. Gibbons, 8 Exch., 922; see Buck vs. Bark, 18 N. Y., 339, 341.)

N. Y. C. C., Sec. 1997.

Sec. 3543. Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.

In *Griswold vs. Haven* (25 N. Y., 595), this maxim is asserted and enforced as a principal upon which, independently of the law of agency, an innocent party may be held responsible for the acts of another. The maxim is also cited and applied in *Exchange Bank vs. Monteath*, 26 N. Y., 505, 513; *Sanford vs. Handy*, 23 Wend., 268; *Root vs. French*, 13 id., 572.

N. Y. C. C., Sec. 1998.

## PART V.

### DEFINITIONS AND GENERAL PROVISIONS.

#### SECTION 3549. Code and Common Law one system.

3550. Code declaration of one Common Law principle does not  
•change others.

3551. Expression of one subordinate rule does not abrogate others.

3552. The rule that statutes in derogation of Common Law, not  
applicable.

3553. Statutes and Common Law substantially the same—a con-  
tinuation of.

3554. How Code is construed.

3555. Words, how used.

3556. Sundry words.

3557. Degrees of care and diligence.

3558. Care and diligence.

3559. Degrees of negligence.

3560. Negligence.

3561. Children.

3562. Debtor and creditor.

3563. Good faith.

3564. Notice.

3565. Actual notice.

3566. Constructive notice.

3567. Certain persons deemed to have constructive notice.

3568. Notice, when impossible.

3569. Paper.

3570. Person.

3571. Several.

3572. Third persons.

3573. Holidays.

3574. Same.

3575. Business days.

3576. Certain acts not to be done on holidays.

3577. Usage, what.

3578. Same.

3579. Value.

3580. Verdict.

3581. Time.

3582. Genders.

3583. Numbers.

3584. Tense.

3585. "Compound interest," what.

3586. "Signature," what.

- SECTION 3587. "Writing," what.  
 3588. "Oath," what.  
 3589. "Seal," what.  
 3590. "State," what.  
 3591. Repeal of former statutes.

Code and  
Common  
Law one  
system.

SEC. 3549. This Code and the Common Law are but parts of one system, differing only in their mode of adoption.

[New section.]

Code decla-  
ration of one  
Common  
Law prin-  
ciple does  
not change  
others.

SEC. 3550. The declaration or expression of a Common Law rule or principle in this Code does not enlarge, limit or change its effect, except so far as such rule or principle is changed by the terms of the Code. It still bears the same relation to the body of the Common Law as it did before the adoption of the Code.

[New section.]

Expression  
of one subor-  
dinate rule  
does not  
abrogate  
others.

SEC. 3551. The expression in this Code of a general Common Law rule upon a subject does not, by implication, change or abrogate subordinate rules pertaining to the same subject; nor does the expression of a portion of the subordinate rules abrogate or change, by implication, other subordinate rules not expressed in Code form.

[New section.]

The rule that  
statutes in  
derogation  
of Common  
Law, not  
applicable.

SEC. 3552. The rule that statutes in derogation of the Common Law are to be strictly construed has no application to this Code.

N. Y. C. C., Sec. 2032.

Statutes and  
Common  
Law sub-  
stantially  
the same—a  
continuation  
of.

SEC. 3553. The provisions of this Code, so far as they are substantially the same as existing statutes, or Common Law, must be construed as continuations thereof, and not as new enactments.

Rev. Laws of Mass., 1858, Chap. 182, Sec. 9.

NOTE.—The words "or Common Law" are new, and inserted to correspond with the theory of the four preceding sections.

How Code is  
construed.

SEC. 3554. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.

NOTE.—It is very difficult to properly clothe the ideas sought to be expressed in the five preceding sections. These sections need to be considered in connection with Sec. 7 of

this Code. They want a *new* judgment from a *new* standpoint—the judgment of an Examining Board; perhaps should be transferred to follow Sec. 7, or to supersede it. Sec. 3553 is of doubtful propriety, though drawn from high authority.

SEC. 3555. Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning; except when a contrary intention plainly appears, and except, also, that the words herein after explained are to be understood as thus explained.

Words, how used.

N. Y. C. C., Sec. 1999—enlarged from Mass.

SEC. 3556. Whenever the meaning of a word or phrase is defined in any part of this Code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.

Sundry words.

N. Y. C. C., Sec. 2000.

SEC. 3557. There are three degrees of care and diligence mentioned in this Code, namely, slight, ordinary and great. The latter include the former.

Degrees of care and diligence.

N. Y. C. C., Sec. 2001.

SEC. 3558. Slight care or diligence is such as persons of ordinary prudence usually exercise about their own affairs of slight importance; ordinary care or diligence is such as they usually exercise about their own affairs of ordinary importance; and great care or diligence is such as they usually exercise about their own affairs of great importance.

Care and diligence.

N. Y. C. C., Sec. 2002.

SEC. 3559. There are three degrees of negligence mentioned in this Code, namely, slight, ordinary and gross. The latter include the former.

Degrees of negligence.

N. Y. C. C., Sec. 2003.

SEC. 3560. Slight negligence consists in the want of great care and diligence; ordinary negligence, in the want of ordinary care and diligence; and gross negligence, in the want of slight care and diligence.

Negligence.

N. Y. C. C., Sec. 2004.

**Children.** SEC. 3561. The term "children," as used in this Code, includes children by birth and by adoption.

N. Y. C. C., Sec. 2005.

**Debtor and creditor.** SEC. 3562. Except in Part III of this Division, every one who owes to another the performance of an obligation is called a debtor, and the one to whom he owes it is called a creditor.

N. Y. C. C., Sec. 2006.

**Good faith.** SEC. 3563. Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious.

N. Y. C. C., Sec. 2007.

**Notice.** SEC. 3564. Notice is either actual or constructive.

N. Y. C. C., Sec. 2008.

**Actual notice.** SEC. 3565. Actual notice consists in express information of a fact.

N. Y. C. C., Sec. 2009.

**Constructive notice.** SEC. 3566. Constructive notice is notice imputed by the law to a person not having actual notice.

N. Y. C. C., Sec. 2010.

**Certain persons deemed to have constructive notice.** SEC. 3567. Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.

If the party who receives information of circumstances suggesting an inquiry for the principal fact, makes that inquiry with due diligence, the result must be either that he will ascertain the fact, or that he will be prevented from doing so by causes for which he is not to blame, and from which he ought not to suffer. If he ascertains it, he then has actual notice, and the doctrine of constructive notice does not apply. If, notwithstanding due diligence, he fails to ascertain it, notice ought not to be imputed to him. The Commissioners, therefore, as respects circumstances putting a person upon inquiry, have limited the doctrine of constructive notice to cases in which there is a failure to make diligent inquiry (see *Foster vs. Beale*, 21 N. Y., 247; *Williamson vs. Brown*, 15 N. Y., 354; *Fassett vs. Smith*, 23 N. Y., 252). The decision in *Kellogg vs. Smith*, 26 N. Y., 13, is put upon the ground that there was a duty of inquiry, both for the bond and the mortgage; but the inquiry made was only as to the mortgage.

N. Y. C. C., Sec. 2011.

**Sec. 3568.** A notice which is false when given, is not made valid by the subsequent happening of the event. Notice, when impossible.

Griffin vs. Goff, 12 Johns., 422; Jackson vs. Richards, 2 Cal., 343. Notice that a party will perform a specified act, is, in strictness, notice of an existing intention to perform the act only.

N. Y. C. C., Sec. 2012.

**Sec. 3569.** The word "paper," as used in this Code, means any flexible material upon which it is usual to write. Paper.

N. Y. C. C., Sec. 2013.

**Sec. 3570.** The word "person," as used in this Code, except when used by way of contrast, includes not only human beings, but bodies politic or corporate. Person.

N. Y. C. C., Sec. 2014.

**Sec. 3571.** The word "several," as used in this Code in relation to number, means two or more. Several.

N. Y. C. C., Sec. 2015.

**Sec. 3572.** The words "third persons," as used in this Code, include all who are not parties to the obligation or transaction concerning which the phrase is used. Third persons.

N. Y. C. C., Sec. 2016.

**Sec. 3573.** Holidays, within the meaning of this Code, are, every Sunday, the first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, every day on which an election is held throughout the State, and every day appointed by the President of the United States, or by the Governor of this State, for a public fast, thanksgiving or holiday. Holidays.

N. Y. C. C., Sec. 2017; Stats. 1851, 523; 1861, 310.

**Sec. 3574.** If the first of January, the twenty-second of February, the fourth of July, or the twenty-fifth of December, falls upon a Sunday, the Monday following is a holiday. Same.

N. Y. C. C., Sec. 2018.

**Sec. 3575.** All other days than those mentioned in the last two sections are to be deemed business days, for all purposes. Business days.

N. Y. C. C., Sec. 2019.

Certain acts  
not to be  
done on  
holidays.

SEC. 3576. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.

N. Y. C. C., Sec. 2020.

Usage, what.

SEC. 3577. Usage, within the meaning of this Code, is a reasonable and lawful public custom concerning transactions of the same nature as those which are to be affected thereby, existing at the place where the obligation is to be performed, and either known to the parties, or so well established, general and uniform, that they must be presumed to have acted with reference thereto.

*Bowen vs. Stoddard*, 10 Metc., 30. See *Cuthbert vs. Cumming*, 10 Exch., 815; aff'd, 11 id., 405.

*Merchants' Bank vs. Woodruff*, 6 Hill, 174; *Bowen vs. Newell*, 8 N. Y., 190.

*Cuthbert vs. Cumming*, 11 Exch., 408; Code La., 1961.

*Stewart vs. Aberdeen*, 4 M. & W., 211; see *Sweeting vs. Pearce*, 7 C. B. [N. S.], 481; *Horton vs. Morgan*, 19 N. Y., 170.

*Cuthbert vs. Cumming*, 11 Exch., 405, aff'g S. C., 10 id., 809; *Graves vs. Legg*, 2 H. & N., 210, aff'g S. C., 11 Exch., 642; 9 id., 709.

*Smith vs. Wright*, 1 Cal., 43; *U. S. vs. Buchanan*, 8 How. [U. S.], 102.

*Sweeting vs. Pearce*, *supra*; *Gabay vs. Lloyd*, 3 B. & C., 793; *Scott vs. Irving*, 1 B. & Ad., 605; *Todd vs. Reid*, 4 B. & Ald., 210; *Lewis vs. Marshall*, 7 M. & G., 745; *Cope vs. Dodd*, 13 Penn. St., 37.

*U. S. vs. Buchanan*, 8 How. [U. S.], 102; *Cope vs. Dodd*, 13 Penn. St., 33, 37; *Wood vs. Wood*, 1 Carr. & P., 59; *Lewis vs. Marshall*, *supra*.

*Hinton vs. Locke*, 5 Hill, 439; *U. S. vs. Buchanan*, 8 How. [U. S.], 102. See *Wadsworth vs. Alcott*, 6 N. Y., 72.

N. Y. C. C., Sec. 2021.

Same.

SEC. 3578. The words "usual," and "customary," as used in this Code, mean "according to usage."

N. Y. C. C., Sec. 2022.

Value.

SEC. 3579. A valuable consideration, within the meaning of this Code, is a thing of value parted with, or a new obligation assumed, at the time of obtaining a thing, which is a substantial compensation for that which is obtained thereby. It is also called simply "value."

N. Y. C. C., Sec. 2023.

Verdict.

SEC. 3580. The word "verdict," as used in this Code, includes not only the verdict of a jury, but also the find-



ing upon the facts, of a Judge, or of a Referee appointed to determine the issues in a cause.

N. Y. C. C., Sec. 2024.

SEC. 3581. The word "year," as used in this Code, Time. means a calendar year, and "month," a calendar month. Fractions of a year are to be computed by the number of months, thus, half a year is six months. Fractions of a day are to be disregarded in computations which include more than one day, and involve no questions of priority.

N. Y. C. C., Sec. 2025.

SEC. 3582. Words used in this Code in the masculine Gender. gender include the feminine, except where a contrary intention plainly appears.

N. Y. C. C., Sec. 2026.

SEC. 3583. Words used in this Code in the singular Numbers. number include the plural, and the plural the singular, except where a contrary intention plainly appears.

N. Y. C. C., Sec. 2027.

SEC. 3584. Words used in the present tense include Tense. the future, but exclude the past.

N. Y. C. C., Sec. 2028.

SEC. 3585. The words "compound interest," as used "Compound interest," what. in this Code, mean interest added to the principal as the former becomes due, and thereafter made to bear interest.

N. Y. C. C., Sec. 2029.

SEC. 3586. The term "signature" includes any name, "Signature" what. mark or sign, written with intent to authenticate any instrument or writing.

SEC. 3587. The words "writing" and "written," as "Writing," what. used in this Code, include "printing" and "printed," except in the case of signatures, and where the words are used by way of contrast to printing. Writing may be made in any manner, except that when a person entitled to require the execution of a writing demands that it be made with ink, it must be so made.

N. Y. C. C., Sec. 2030.

SEC. 3588. The word "oath" includes "affirmation" "Oath," what. in all cases where an affirmation may be substituted for

an oath; and in like cases the word "swear" includes the word "affirm." Every mode of oral statement under oath or affirmation is embraced by the term "testify," and every written one, in the term "depose."

"Seal,"  
what.

SEC. 3589. When the seal of a Court or public officer, or officer, is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto.

"State,"  
what.

SEC. 3590. The word "State," when applied to the different parts of the United States, includes the District of Columbia and the Territories, and the words "United States" may include the District and Territories.

Repeal of  
former  
statutes.

SEC. 3591. All statutes, laws and rules heretofore in force in this State, inconsistent with the provisions of this Code, are hereby repealed or abrogated; but such repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any proceeding already taken, except as in this Code provided.

N. Y. C. C., Sec. 2033.

NOTE.—*Definitions and General Provisions* can be better arranged after the four Codes are sectionized, printed and indexed. Provisions that are general—applicable to the four Codes—should be classified and printed in each Code with the more special provisions pertaining to that particular Code. It is possible some of the definitions are duplicated in substance by appearing in the same or different form in the body of the work. Attention is called to the consideration of the subject after the indexes are prepared, or after the Codes are printed, when the matter can be examined with greater facility.

## FINAL NOTE.

This Code is not put forth as complete. Some defects must exist in the arrangement and first print of a work of this character and extent. It is unnecessary to particularize the difficulties, patent and latent, which accompany such a codification, and from which arise some omissions, repetitions, conflicts, and sometimes faulty expression. The fact that the revisers have felt themselves under "lash and spur," to reach certain results before a meeting of the Legislature, has constituted a little of the embarrassment in revision. The Commissioners have, for the most part, worked separately. The Titles on *Corporations, Wills, Succession, Homesteads, Partnership and Insurance*, have been prepared by one Commissioner, and the remainder of the Code by another, while the third was engaged on the other Codes. No part of the work has passed the critical ordeal of the mind of more than one Commissioner. Many sections have been presented for *consideration*, rather than adoption. In a few instances attention is called by notes to different sections and points to be considered. The work is now in condition—arranged, sectionized and printed—to afford the greatest facility for a careful examination.

It is to be regretted that the Commission has not had the time to give it such examination, and more fully compare its provisions with our Supreme Court decisions. It will be observed that they were examined and noted with considerable pains-taking in the earlier part of the work, but it became evident that less time must be spent in this particular labor, or failure to make the volume ready for the Legislature must ensue. It is believed, however, that there are but very few instances in which the law, as stated in the Code, is not in consonance with the decisions, so far as they have been rendered upon the subjects treated; and in most of these few cases it will probably be found that the rule ought to be as contained in the Code.

A judicious selection and citation of leading cases under each section, from the notes and references under corresponding sections of the New York Civil Code, would give a useful finish to the work. These can be added after adoption, in the publication, if deemed advisable.

Let us now turn to the other side of the question. Reasonable completeness is all that can be expected before adoption, trusting somewhat to future amendment to remedy such defects as cannot be well foreseen. Much care and labor has been bestowed upon the Code. It is *very nearly completed*. With the facilities now offered for a final examination, it is believed that it can be made ready for adoption before the adjournment of the coming Legislature; probably at a comparatively early period in the session. It is due to the Bench and Bar, to speak candidly of all possible defects; but at the same time, with a clear conception of the condition, it is confidently believed that it will be perfected for adoption as above indicated. Of course the degree of perfection to which a work of this character can be brought depends upon the time, patience, industry and good judgment bestowed upon it. The labor shall be unremitting until absolute recommendation for adoption can be given. A further exposition will accompany its presentation to the Legislature, showing where each statute embraced may be found, and if disintegrated and distributed to different Titles, then the sections will be given, showing where the several parts are; especially will it be so with the important statute of "Fraudulent Conveyances and Contracts."

It rests principally with the Bench and Bar to scrutinize the style, accuracy and consistency of the Code, and to pass judgment upon it. If perfected and adopted, it will prove an immeasurable blessing to the present and future generations.

# **I N D E X .**



# INDEX.

	Section.	Page.
<b>A</b>		
<b>ABANDONED:</b>		
finder of thing, not bound to keep it for owner.....	1871	358
bed of stream, ownership of.....	1019	213
<b>ABANDONMENT:</b>		
ground for divorce.....	91	24
of husband by wife, relieves him from duty of support.....	182	41
of child by parent, evidence of relinquishment of control.....	197	43
of homestead, how only effected.....	1241	254
of ship by shipmaster.....	2040	380
of ship, duties of shipmaster on.....	2041	380
<b>IN MARINE INSURANCE:</b>		
defined.....	2716	468
may be made, in what cases.....	2717	469
may be made, at what time.....	2719	469
how effected.....	2721	469
must be absolute and total.....	2718	469
when defeated.....	2720	469
notice of, may be oral or written.....	2721	469
notice of, to contain what.....	2722	470
can be sustained only on ground specified in notice.....	2723	470
effect of.....	2724	470
insurer paying for total loss, entitled to.....	2725	470
agents of insured act for insurer after.....	2726	470
acceptance of, not necessary.....	2727	470
acceptance of, not presumed from silence.....	2727	470
acceptance of, conclusive.....	2728	470
made and accepted, irrevocable.....	2729	470
to whom freightage belongs after.....	2730	470
liability of insurer refusing to accept.....	2731	471
not necessary to recover actual loss.....	2732	471
not necessary to recover actual total loss.....	2709	467
terminates authority of master on behalf of owner.....	2381	424
See INSURANCE.		
<b>ABATEMENT:</b>		
of legacies.....	1362	276
of nuisance, does not impair claim for damages.....	3484	592
of public nuisance, by whom made.....	3494	593
of public nuisance, how made.....	3495	593
of private nuisance, when allowed.....	3502	594

	Section.	Page.
<b>ABDUCTION :</b>		
forbidden .....	48	13
<b>ABLE AND WILLING :</b>		
party offering performance, must be.....	1495	300
party, need not offer payment, when.....	3130	530
<b>ABSENCE :</b>		
effect of, on marriage.....	61	16
ib.....	96	26
ib.....	98	26
temporary, when may be converted into desertion.....	101	27
<b>ABSURDITY :</b>		
to be disregarded in interpreting contracts.....	1640	324
<b>ABUSE :</b>		
of parental authority, remedy for.....	203	44
of authority, renders contract voidable.....	1567	311
ib.. ..	1575	313
<b>ACCEPTANCE :</b>		
of accord, is satisfaction.....	1523	304
of benefit of transaction, effect of.....	1569	317
of partial performance, when necessary.....	1741	341
of rent, renews lease, when .....	1945	266
of guaranty, notice of, when necessary.....	2796	491
of principal, waives claim to interest, when .....	3290	556
<b>OF ABANDONMENT (under Insurance) :</b>		
not necessary.....	2727	470
effect of.....	2728	470
irrevocable .....	2729	471
effect of insurer's refusing.....	2731	471
<b>OF BILL OF EXCHANGE :</b>		
presentment for.....		538
how made.....	3193	540
must be absolute.....	3194	541
what may be received by holder as sufficient.. ..	3195	541
by separate instrument.....	3196	541
promise to accept, when equivalent to.....	3197	541
may be cancelled, when.....	3198	541
what is admitted by. ....	3199	542
for honor, may be made, when.....	3203	542
for honor, holder not bound to receive.....	3204	542
for honor, how made.....	3205	542
for honor, how enforced.....	3206	542
notice of dishonor, not excused by.....	3207	543
<b>OF PROPOSAL TO CONTRACT :</b>		
how communicated.....	1582	313
when complete.....	1583	316
performance of conditions is.....	1584	316
acceptance of consideration is. ....	1584	316
must be absolute.....	1585	316
qualified, is new proposal.....	1585	316
<b>ACCEPTOR :</b>		
of bill of exchange must write acceptance, how.....	3193	540
of bill of exchange bound by acceptance separate from bill, when .....	3196	541
of bill of exchange may cancel acceptance, when .....	3198	541
of bill of exchange admits what, by acceptance.....	3199	542
of bill of exchange for honor, rights and duties of .....	3205	542
ib.....	3206	542



	Section.	Page.
<b>ACCESSION :</b>		
<b>To REAL PROPERTY :</b>		
by fixtures.....	1013	212
by alluvion.....	1014	212
by removal of bank.....	1015	213
by accumulation of earth.....	1017	213
by change of river's course.....	1019	213
<b>To PERSONAL PROPERTY :</b>		
by union of several things.....	1025	214
by admixture of materials.....	1030	215
by formation of new things.....	1029	214
by workmanship.....	1028	215
by wilful trespass.....	1031	215
<b>ACCESSORY :</b>		
passes by transfer of principal.....	1084	222
ib.....	3540	599
lien is.....	2909	496
<b>ACCIDENT :</b>		
error in contract caused by, to be disregarded.....	1640	324
deposit by, must be accepted.....	1816	351
thing gained by, held in trust.....	2224	404
See MISTAKE.		
<b>ACCORD :</b>		
defined.....	1521	304
effect of.....	1522	304
acceptance of, is satisfaction.....	1523	304
of liquidated debt.....	1524	304
<b>ACCOUNT :</b>		
employé must render.....	1986	372
voluntary interferer with property must render.....	2078	384
for what trust must.....	2237	406
mutual liability of partners to render.....	2412	423
partner may be required to, for certain profits.....	2438	431
<b>ACCRETION :</b>		
ownership of deposits formed by.....	1014	213
ib.....	1016	213
<b>ACCUMULATIONS :</b>		
disposition of.....	722	164
when void.....	723	164
certain, allowed.....	724	164
certain directions concerning, when void in part.....	725	164
surplus of, in trust, when liable to creditors.....	859	184
certain allowances may be made out of.....	726	165
<b>ACKNOWLEDGMENT :</b>		
of declaration of marriage.....	75	21
of inventory of separate property of wife.....	171	39
of marriage settlement contracts.....	184	41
ib.....	185	41
of contract of apprenticeship of alien minors.....	275	56
of articles of incorporation.....	295	66
of execution of power by married woman.....	898	191
of consent to execution of power.....	907	192
letters patent may be recorded without.....	1159	236
of instruments for record.....	1160	236
of instruments evidencing judgment title, for record.....	1161	236
who may take, in this State.....	1169	238
ib.....	1170	238

	Section.	Page.
<b>ACKNOWLEDGMENT: (Continued.)</b>		
who may take, in other States.....	1171	239
who may take, out of the United States.....	1172	239
deputy may take.....	1173	239
requisites for.....	1174	240
officer taking, must indorse certificate thereon.....	1175	240
form of certificate of.....	1176	240
by attorney in fact, how made.....	1177	240
certificate of, by attorney in fact.....	1178	241
by married woman.....	1179	241
certificate of, by married woman.....	1180	241
effect of, by married woman.....	1181	242
interpreter may be employed in taking.....	1182	242
officers authorized to take, may punish for contempt, when.....	1190	244
officers taking, must affix seals and signatures.....	1191	244
after, party may have action to correct error in certifying.....	1192	245
of instruments heretofore made, to be governed by then exist- ing laws.....	1194	245
statutes curing void or defective, preserved.....	1196	246
of instruments affecting homesteads.....	1240	253
of homestead declaration.....	1254	257
of certificate of change of name in partnership.....	2469	435
of certificate on formation of special partnership.....	2480	437
of real mortgages.....	2941	501
of personal mortgages.....	2962	505
of assignment for benefit of creditors.....	3553	507
<b>ACQUIESCENCE:</b>		
removes objections.....	3516	596
<b>ACQUISITION OF PROPERTY:</b>		
by accession.....		212
by occupancy.....		211
by succession.....		273
by transfer.....		216
by will.....		250
by corporations.....	372	87
ib.....	373	87
ib.....	1000	211
<b>ACT OF GOD:</b>		
injures no one.....	3526	597
See SUPERHUMAN CAUSE.		
<b>ACTION:</b>		
minor may enforce his rights by civil.....	37	10
to affirm unsolemnized marriage.....	76	21
to obtain decree of nullity of marriage.....	83	23
to obtain exclusive control of children.....	199	44
for abuse of parental authority.....	203	44
by Supervisors, to recover for support of child.....	205	44
by apprentice, to annul indentures.....	277	57
to recover stock sold to pay delinquent assessments.....	347	81
to recover possession of property.....	795	175
ib.....	810	177
to enforce easement, by whom maintainable.....	809	177
for injury to inheritance, by whom maintainable.....	825	180
to correct defect in certificate of acknowledgment.....	1192	245
to prove instrument for record.....	1193	245
to quiet title.....	1213	249
by creditor of mortgageor.....	2976	508
by creditor of mortgagee.....	2977	508
relating to special partnership, special partner need not be party to.....	2492	438

# INDEX.

617

	Section.	Page.
<b>ADEMPITION :</b>		
of legacy, advancement or gift, when deemed.....	1351	273
<b>ADMINISTRATOR: See PERSONAL REPRESENTATIVES.</b>		
<b>ADOPTION :</b>		
child may be adopted.....	221	47
who may adopt.....	222	47
consent of wife, when necessary.....	223	47
consent of child's parents necessary.....	224	47
consent of child, when necessary.....	225	48
proceedings on.....	226	48
Judge's order on.....	227	48
effect of.....	228	48
effect of, on former relations of child.....	229	48
of illegitimate child.....	230	48
<b>ADULTS :</b>		
who are.....	19	7
minors become, by marriage.....	20	8
by laws of other States or country, when deemed such in this State.....	22	8
compensation for support of adult child.....	210	45
<b>ADULTERY :</b>		
defined.....	92	25
divorce, when granted for.....	93	25
divorce, when denied for.....	145	36
legitimacy of issue of marriage divorced on account of.....	145	36
ib.....	146	36
disposition of community property on divorce for.....	148	37
<b>ADVANCEMENT :</b>		
what is deemed.....	1392	282
effect of.....	1308	268
effect of when heir advanced to dies before testator.....	1394	283
when deemed ademption.....	1351	273
value of, how determined.....	1393	283
constitutes part of distributive share.....	1390	282
when in excess or insufficient, effect of.....	1391	282
<b>ADVANTAGE :</b>		
unfair, when fraudulent.....	1575	313
unfair, when evidence of undue influence.....	1575	313
trustee must not use influence to obtain.....	2229	404
ib.....	2231	404
partner must not obtain, over co-partners.....	2411	427
<b>ADVERSE CLAIM :</b>		
depository to give notice to depositor of.....	1825	352
trustee to give notice to beneficiary of his acquisition of.....	2233	405
<b>ADVERSE POSSESSION :</b>		
owner of property in, may transfer his right.....	1046	217
property in, may be mortgaged.....	2925	498
mortgage of property in, effect of.....	2929	498
<b>AFFIDAVIT :</b>		
when may be required in actions for divorce.....	130	33
of officers of corporations, on filing articles of incorporation...	294	66
of publication of notice of sale of delinquent stock.....	348	81
of publication of notice of change of partnership name.....	2471	435

	Section.	Page.
<b>AFFIDAVIT: (Continued.)</b>		
of publication of notice of formation of special partnership...	2484	437
of publication of notice of intention to demand assessment on mines.....	2520	443
judgment creditor entitled to appraisalment of homestead on...	1242	254
of truth of inventory to be made by assignor for benefit of creditors.....	3462	588
<b>AGENCY:</b>		
defined.....	2295	413
parties to, defined.....	2295	413
actual.....	2299	413
ostensible.....	2300	413
how created.....	2308	414
creation of, orally.....	2309	414
creation of, by writing.....	2309	414
creation of, by ratification.....	2310	415
consideration not necessary to create.....	2308	414
authority conferred by.....	2315	415
actual authority conferred by.....	2316	415
ostensible authority conferred by.....	2317	416
extent of authority conferred by.....		416
ib.....		417
obligations of parties to.....		417
ib.....		418
rights of third persons under.....		419
ib.....		420
delegation of.....		420
termination of.....	2355	421
termination of, when agent has no interest.....	2356	421
<b>AGENT:</b>		
defined.....	2295	413
authority of, to execute real instrument must be in writing....	1732	330
must keep his principal informed.....	2020	377
authority of, limited.....	2019	377
collecting, duty of.....	2021	377
agent of, not responsible to principal.....	2022	377
who may appoint.....	2296	413
special, defined.....	2297	413
general, defined.....	2297	413
actual, defined.....	2299	413
ostensible, defined.....	2300	413
authority of.....	2300	414
authority of, may extend to what.....	2305	414
has no authority to defraud principal.....	2306	414
how derives his authority.....	2307	414
consideration not necessary to creation of authority of.....	2308	414
authority of, must be in writing.....	2309	414
oral authority to, when sufficient.....	2309	414
authority, how conferred on, by ratification.....	2310	415
partial ratification of act of, when total.....	2311	415
ratification of act of, when valid and when void.....	2312	415
ratification of act of, not to prejudice third person.....	2313	415
ratification of act of, may be rescinded, when.....	2314	415
extent of authority of.....	2315	415
actual authority of.....	2316	415
ostensible authority of.....	2317	416
implied authority of.....	2319	416
effect of special restrictions on authority of.....	2318	416
authority of, to disobey instructions.....	2320	416
general authority of, how limited.....	2322	416
authority of, to sell personal property, effect of.....	2323	417
authority of, to sell real property, effect of.....	2324	417

# INDEX.

619

	Section.	Page.
<b>AGENT: (Continued.)</b>		
authority of, to sell, includes authority to receive price, when.	2325	417
ib.....	2326	417
represents principal to what extent.....	2330	417
acts of, bind principal, when.....	2331	418
ib.....	2333	418
deemed to have notice, of what.....	2332	418
when principal exonerated by payment to.....	2335	418
when person dealing with, may set off claim against.....	2336	418
principal responsible for negligence of, when.....	2337	419
principal responsible for wrongful acts of, when.....	2338	419
obligations of, to third persons.....	419	419
obligations of, as to warranty of authority.....	2342	419
obligations of, as principal in certain cases.....	2343	419
must surrender property to true owner.....	2344	420
obligations of, when incapable of contracting.....	2345	420
may delegate power, when.....	2349	420
responsible for sub-agent, when.....	2350	420
when not responsible for sub-agent.....	2351	420
power of, how terminated.....	2356	421
general partner is, for the firm.....	2429	429
auctioneer as.....	421	421
factor as.....	422	422
shipmaster as.....	423	423
ship's manager as.....	425	425
insurance by, how effected.....	2589	453
indemnity extends to acts of.....	2775	476
notice of dishonor, how given by.....	3149	534
of insured, acts for insurer on abandonment.....	2726	470
damages for breach of warranty of authority of.....	3228	563
<b>AGREEMENT:</b>		
of separation, husband and wife may make.....	159	38
consideration for such.....	160	38
in indentures of apprenticeship.....	272	56
to sell personal property, when title passes to buyer under....	1142	234
of sale not a revocation of will.....	1300	266
what must be in writing.....	1624	321
contract in writing may be altered by.....	1698	332
for sale, what.....	1726	338
to buy, defined.....	1728	338
to sell or buy, defined.....	1729	339
to sell, defined.....	1727	338
to sell, what may be subject of.....	1730	339
to sell real property.....	1731	339
ib.....	1741	341
to sell real property, form of grant required by.....	1733	339
to sell real property, binds seller to insert certain covenants...	1734	339
form of such covenants.....	1735	340
to sell personal property.....	1739	340
to manufacture, from materials furnished by manufacturer....	1740	341
of sale, with warranty, entitles buyer to inspect goods.....	1785	347
of sale may be rescinded for breach of warranty.....	1786	347
seamen not to be deprived of wages or lien by.....	2052	382
with seamen, restrictions on.....	2053	381
obligations of common carrier can be altered only by.....	2174	396
certain, with common carrier, void.....	2175	396
effect of written, with common carrier.....	2176	396
not to transfer insured interest, when void.....	2599	454
of indemnity.....	476	476
to convey real property, damages for breach of.....	3316	560
to purchase real property, damages for breach of.....	3317	561
to sell personal property, damages for breach of.....	3318	561
ib.....	3319	561
to buy personal property, damages for breach of.....	3321	561

	Section.	Page.
<b>AGRICULTURAL FAIR CORPORATIONS:</b>		
may be formed .....	286	61
may acquire and hold how much real estate.....	620	144
must not contract debts in excess of amount on hand.....	621	144
not for profit.....	622	145
may fix fee, etc., for membership.....	622	145
<b>AGRICULTURAL LAND:</b>		
limitation, on lease of .....	717	163
power to lease, when void.....	925	195
<b>ALIEN:</b>		
minors, apprenticeship of.....	274	56
may hold property.....	671	158
inheriting, when must claim or be barred.....	672	158
ib.....	1399	284
resident, may take by succession.....	1399	284
<b>ALIENAGE:</b>		
of relative, does not affect right of succession.....	1399	284
<b>ALIENATION:</b>		
restraints on, when void.....	711	163
ib.....	716	163
how long power of, may be suspended.....	715	163
disposition of income during suspension of power of.....	733	165
of intermediate interest does not defeat future interest.....	742	166
suspension of power of.....	770	172
suspension of power of, by trust.....	771	172
power authorizing, a general power .....	832	188
power authorizing, of estate less than fee.....	833	188
computation of term of suspension of, in execution of power.....	912	193
See GRANT; TRANSFER.		
<b>ALIMONY:</b>		
when Court may grant.....	136	35
ib.....	137	35
ib.....	139	35
security for.....	140	35
when may not be granted.....	142	35
out of what property granted.....	141	35
<b>ALLUVION:</b>		
ownership of.....	1014	212
<b>ALTERATION:</b>		
of interests disposed of by will, when a revocation of will....	1303	267
of interests disposed of by will, when does not revoke will....	1302	266
of contract, may be made by consent.....	1697	332
of contract in writing, how made.....	1693	332
contract extinguished by.....	1697	332
unauthorized, of contract, effect of.....	1700	333
of contract in duplicate, effect of.....	1701	333
of representation in insurance.....	2576	451
of thing covered by fire insurance, increasing risk, effect of...	2753	474
of thing insured, not increasing risk, effect of.....	2754	474
of obligation exonerates guarantor.....	2821	484
<b>ALTERNATIVE:</b>		
future interest may be in.....	696	161
obligation, who has right of selection under.....	1448	292
obligation, right of selection under, how lost.....	1449	293
obligation, selection under, how made.....	1450	293
obligation, effect of nullity of one branch of.....	1451	293
negotiable instrument may be made in.....	3090	534

# INDEX.

621

	Section.	Page.
<b>AMBIGUITY:</b>		
in grant, how construed.....	1069	220
in will, how construed.....	1323	270
in contract, how construed.....	1649	325
<b>ANIMALS:</b>		
corporations for insuring lives of domestic, may be formed....	286	61
corporations for improving breed of, may be formed.....	286	61
domestic, subject of ownership.....	655	155
wild, how far subject of ownership.....	656	155
depository of, must use what degree of care.....	1834	353
rate of compensation of depository of.....	1853	355
borrower of, for use, must use great kindness.....	1887	359
<b>ANNUITY:</b>		
defined .....	1357	274
owner of, may dispose of it.....	868	186
when due.....	1368	277
<b>ANNULMENT:</b>		
of indentures of apprenticeship, causes for.....	276	56
proceedings for such.....	277	57
of marriage.....		22
See NULLITY; DIVORCE.		
<b>APPEAL:</b>		
order for distribution of property on divorce, subject to revision on.....	149	37
<b>APPEAR:</b>		
that which does not, deemed not to exist.....	3530	598
<b>APPLICATION:</b>		
of income to support, etc., of minor.....	726	165
of trust property, who must see to.....	2244	406
of security for payment of debt, may be compelled, when....	2854	489
of payments by the debtor.....	1479	297
of payments by the creditor.....	1479	297
of payments by the law.....	1479	297
<b>APPOINTMENT:</b>		
of guardian by the Court.....	243	50
ib.....	244	50
of guardian by the Court supersedes parent.....	204	44
no person guardian of estate without.....	242	50
effect of power of.....	782	174
of trustee, how made.....	2287	411
of successor to trustee, duty of trustee concerning.....	2260	408
<b>APPORTIONMENT:</b>		
of burden of servitude on partition of dominant tenement....	807	177
of losses occasioned by collision of vessels.....	973	203
of consideration in case of prevention of performance.....	1514	303
of covenants.....	1467	295
of hire.....	1935	365
of freightage, by contract.....	2140	392
ib.....	2141	392
of freightage, according to distance.....	2142	392
of lien.....	2912	496
<b>APPRAISEMENT:</b>		
of homestead, what constitutes.....	1262	258
oath of appraisers attached to.....	1263	254

	Section.	Page.
<b>APPRAISERS:</b>		
appointment of, to assess value of homestead.....	1242	234
ib.....	1261	238
return of.....	1263	238
oath of, on appraisalment.....	1262	238
fees of, by whom paid.....	1244	235
<b>APPRENTICE:</b>		
who may be bound as.....	264	54
service of, how enforced.....	278	57
when may recover for services.....	276	56
may have action to annul indentures.....	277	57
See APPRENTICESHIP.		
<b>APPRENTICESHIP:</b>		
who may enter into.....	264	54
whose consent necessary to, and how given.....	265	54
consent to, to be in writing.....	266	55
executors may bind out to.....	267	55
Supervisors may bind out to.....	268	55
town officers may bind out paupers to.....	269	55
what must be stated in indentures of.....	270	55
conditions in indentures of.....	271	55
ib.....	272	56
deposit of indentures of.....	273	56
of alien minors, how effected.....	274	56
ib.....	275	56
causes for annulling indentures of.....	276	56
proceedings to annul indentures of.....	277	57
service, how enforced.....	278	57
<b>APPROPRIATION:</b>		
of payments, by the debtor.....	1479	297
of payments, by the creditor.....	1479	297
of payments, by the law.....	1479	297
<b>APPURTENANCES:</b>		
defined.....	661	156
to land, what.....	801	176
to ship, what.....	961	200
pass, by transfer of land.....	1084	222
ib.....	368	86
ib.....	3540	509
See EASEMENTS; SURVITUDE.		
<b>ARBITRATION:</b>		
agreement for, not specifically enforced.....	3390	575
<b>ART:</b>		
corporations for promotion of, may be formed.....	236	61
married women may be corporators, etc., of such.....	235	60
<b>ARTICLES OF INCORPORATION:</b>		
defined.....	289	64
what to contain.....	290	64
ib.....	291	65
prerequisites to filing.....	291	65
ib.....	292	66
must be subscribed by whom.....	295	66
of insurance companies to be submitted to Insurance Commis-		
sioner.....	296	66
certificate to issue after filing.....	297	67
certified copy of, prima facie evidence of facts therein.....	298	67
misnomer in, does not invalidate.....	350	83



	Section.	Page.
<b>ASCERTAINABLE:</b>		
parties to contract must be.....	1558	310
object of contract must be.....	1596	317
consideration of contract must be.....	1611	320
ib.....	1612	320
ib.....	1613	320
payee under negotiable instrument must be, when.....	3089	524
damages must be clearly.....	3303	558
act to be specifically enforced must be.....	3390	575
<b>ASSESSMENTS:</b>		
<b>Of CORPORATIONS :</b>		
Directors may levy.....	331	76
limit of, and how levied.....	332	77
majority of Board of Directors may levy.....	333	77
order for levying to contain, what.....	334	77
notice of, and its form.....	335	77
publication and service of notice of.....	336	78
delinquent notice and its form and contents.....	337	78
ib.....	338	79
publication of delinquent notice.....	339	79
sale of stock to pay.....	341	79
not to be invalidated.....	346	81
action to recover stock sold for delinquent.....	347	81
<b>Of MINES (Unincorporated):</b>		
how made.....	2517	442
notice of such, how served on partners.....	2518	442
how levied.....	2519	443
shares may be sold on failure to pay.....	2520	443
limit of.....	2521	444
ad tional may be levied, when.....	2521	444
<b>ASSIGNEE:</b>		
of lessor, liability of.....	822	179
beneficial powers, when pass to.....	895	190
<b>For BENEFIT OF CREDITORS :</b>		
not a purchaser for value.....	3460	588
must give bonds.....	3467	589
has no power till bond and inventory filed.....	3468	590
may be required to account.....	3469	590
certain property does not pass to.....	3470	590
entitled to what compensation.....	3471	590
under void assignment, when not liable.....	3472	590
<b>ASSIGNMENT:</b>		
beneficial trusts pass by insolvent. ....	895	190
non-negotiable contract in writing may pass by.....	1459	294
of partnership property, partner cannot make.....	2430	430
of real mortgage may be recorded.....	2947	502
of real mortgage, effect of recording.....	2947	502
general, by maker of negotiable instrument to indorser, excuses notice of dishonor.....	8157	535
<b>For BENEFIT OF CREDITORS :</b>		
who may make.....	3449	585
certain transfers not affected by provisions concerning.....	3451	585
what debts may be secured by.....	3452	585
what debts may be preferred by ...	3453	585
preference in, must be absolute.....	3454	586
preference in, cannot affect right to priority otherwise created	3455	586
preference in, in case of joint debtors.....	3456	586
void against creditor, when .....	3457	58
ib.....	3459	587
must be in writing.....	3458	587
must be subscribed.....	3458	587

	Section.	Page.
<b>ASSIGNMENT: (Continued.)</b>		
must be acknowledged or proved.....	3458	587
gives no rights greater than debtor had .....	3460	588
inventory to accompany.....	3461	588
affidavit of truth of inventory to be annexed to.....	3462	588
inventory accompanying, must be filed where.....	3463	589
must be recorded where.....	3463	589
ib.....	3464	589
void if not recorded.....	3464	589
of real property, subject to certain provisions.....	3466	590
assignee under, must give bond.....	3467	590
when power devolves on assignee under.....	3468	590
assignee under, may be required to account.....	3469	590
compensation of assignee under .....	3471	590
assignee not liable for acts in good faith, though void.....	3472	590
property exempt from execution does not pass by.....	3470	590
life insurances do not pass by.....	3470	590
how cancelled or modified.....	3473	590
partner has no authority to make.....	2430	430
<b>ASSIGNOR:</b>		
may give preferences, when.....	3453	586
must subscribe assignment.....	3458	587
must file inventory.....	3461	588
must make affidavit to truth of inventory.....	3462	588
insurance on life of, does not pass.....	3470	590
<b>ASSURANCE:</b>		
executory contract for sale, binds seller to insert covenant of further.....	1734	339
See <b>INSURANCE</b> .		
<b>ASYLUM:</b>		
who may be placed in lunatic, and how.....	258	53
orphans in orphan, may be apprenticed, how.....	265	54
corporations may be formed for maintenance of.....	286	61
<b>ATTORNEY:</b>		
lien of.....	3066	521
See <b>POWER OF ATTORNEY</b> ; <b>ATTORNEY IN FACT</b> .		
<b>ATTORNEY-GENERAL:</b>		
may inquire into affairs of corporations.....	382	89
duty of, when alien heir does not claim inheritance.....	1400	384
<b>ATTORNEY IN FACT:</b>		
how must execute certain instruments.....	1095	225
must exhibit what, to officer taking acknowledgment.....	1177	240
form of certificate of acknowledgment by.....	1178	241
<b>ATTORNMENT:</b>		
by tenant to landlord, unnecessary.....	1126	233
by tenant to stranger, void.....	1128	233
<b>AUCTION:</b>		
sale by, defined.....	1792	345
sale by, when complete.....	1793	345
withdrawal of bid at sale by.....	1794	345
written conditions of sale by, not to be modified.....	1795	345
sale by, without reserve, rights of bidder at.....	1796	345
by-bidding at sale by, prohibited.....	1797	345
memorandum of sale by, by whom made.....	1798	349
sale of delinquent stock to be by.....	341	79
sale of pledged property to be by.....	3005	511

# INDEX.

625

	Section.	Page.
<b>AUCTIONEER :</b>		
memorandum of, binding .....	1798	348
cannot modify written conditions of sale.....	1795	348
authority of, from seller.....	2362	421
authority of, from bidder.....	2363	422
<b>AUTHENTICATION:</b>		
of marriage.....	68	19
See MARRIAGE.		
<b>AUTHOR:</b>		
of power, defined.....	880	188
of product of the mind, exclusive owner thereof.....	980	208
rights of subsequent.....	984	208
<b>AUTHORITY :</b>		
abuse of, renders contract voidable.....	1567	311
ib.....	1575	313
<b>Of Agent :</b>		
what may be conferred.....	2304	414
what cannot be conferred.....	2306	414
how conferred.....	2307	414
consideration for, unnecessary.....	2308	414
oral, sufficient in general.....	2309	414
when must be in writing.....	2309	414
ib.....	1732	277
by ratification.....	2310	415
extent of.....	2315	415
actual, defined.....	2316	415
ostensible, defined.....	2317	416
ostensible, binding in whose favor.....	2318	416
to do what is necessary or usual ..	2319	416
to make representations.....	2319	416
to disobey instructions.....	2320	416
general, limited by specific.....	2321	416
exceptions to general.....	2322	416
to sell personal property.....	2323	417
to sell real property.....	2324	417
to convey real property, must be in writing.....	1732	339
to sell generally.....	2325	417
ib.....	2326	417
effect of use of.....	2330	417
effect of incomplete execution of.....	2331	418
effect of transcending.....	2333	418
implied warranty of.....	2342	419
damages for breach of warranty of.....	5328	563
delegation of, when allowed.....	2349	420
termination of.....	2349	420
effect of agent acting without.....	2350	420
<b>Of AUCTIONEER:</b>		
from seller.....	2362	421
from bidder.....	2363	422
<b>Of EXECUTOR:</b>		
to appoint executor, void.....	1372	277
<b>Of FACTOR:</b>		
to insure.....	2368	422
to delegate authority.....	2368	422
to sell.....	2368	422
ostensible.....	2369	422
<b>Of PARENT:</b>		
remedy for abuse of.....	203	44
when ceases.....	204	44

	Section.	Page.
<b>AUTHORITY: (Continued.)</b>		
<b>OF SHIPMASTER:</b>		
to borrow on credit of owner.....	2374	423
to act for owner of cargo.....	2375	423
to make contracts.....	2376	423
to hypothecate ship.....	2377	423
ib.....	3019	515
to hypothecate freightage.....	2377	423
ib.....	3019	515
to hypothecate cargo.....	2377	423
ib.....	3038	517
to sell ship.....	2378	424
to sell cargo.....	2379	424
to ransom ship.....	2380	424
ceases, when.....	2381	424
<b>OF SHIP'S MANAGER:</b>		
general.....	2388	425
restrictions on.....	2389	425
<b>OF TRUSTEE:</b>		
as agent.....	2367	409
<b>AVERAGE:</b>		
general, defined.....	2148	393
general, how adjusted.....	2152	393
general, owner of goods stowed on deck, when entitled to benefit of.....	2154	394
general, value, how ascertained for purpose of.....	2153	394
general, marine insurer liable for.....	2712	468
ib.....	2744	473
shipmaster has power to adjust.....	2388	425
insurance free from, effect of.....	2711	468
<b>B</b>		
<b>BAIL:</b>		
defined.....	2780	478
how regulated.....	2781	478
<b>BANKER:</b>		
lien of.....	3062	521
<b>BANKING:</b>		
business corporations in general must not carry on.....	256	83
special partnership cannot carry on.....	2477	436
corporations for carrying on certain kinds of, may be formed.....	286	61
<b>BANK NOTE:</b>		
negotiable after payment.....	3261	546
indorsee of, acquires good title after dishonor.....	3262	549
See CHECK; NEGOTIABLE INSTRUMENT.		
<b>BARTER:</b>		
factor has no authority to.....	2368	422
See EXCHANGE.		
<b>BASTARD:</b> See ILLEGITIMATE CHILD.		
<b>BED:</b>		
abandoned, of stream, ownership of.....	1019	213
<b>BELIEF:</b>		
erroneous, renders contract voidable.....	1567	311
erroneous, is mistake of fact.....	1577	314
false statement without, fraud.....	1572	313
ib.....	1710	335

# INDEX.

627

	Section.	Page.
<b>BENEFICIARY:</b>		
<b>IN REAL PROPERTY:</b>		
has no interest therein.....	863	185
when may dispose of his interest.....	868	186
when cannot dispose of his interest.....	867	186
when entitled to release from trustee .....	850	183
<b>OF TRUST:</b>		
defined.....	2218	402
must be indicated by trust.....	2221	403
ib.....	2222	403
may allow trustee to act in adverse interest .....	2230	404
trustee must not take advantage of.....	2231	405
consent of, necessary to allow trustee to take adverse trust....	2232	405
entitled to information of trustee's adverse interest.....	2233	405
what is fraud against.....	2234	405
certain transactions of, presumed to be under undue influence	2235	405
may require trustee to account for breach of trust, how.....	2237	406
ib.....	2238	406
may take advantage of trust till rescinded.....	2251	407
consent of, when necessary to revocation of trust.....	2280	410
trustee may be discharged by consent of, when.....	2282	411
See TRUST; USES AND TRUSTS.		
<b>BENEFIT:</b>		
consent of party entitled to, necessary to transfer of burden..	1457	293
voluntary acceptance of, is assumption of burden.....	1589	317
he who takes, must bear burden.....	3521	597
<b>BENEVOLENCE:</b>		
corporations for purposes of, may be formed.....	286	61
married women may become corporators, etc., of such.....	285	61
<b>BEQUEST:</b>		
what may pass by.....	1274	261
who may take by.....	1275	261
subject to lien, when .....	1301	266
when takes partial effect only.....	1302	266
when revoked by transfer.....	1303	267
when does not lapse by death of legatee.....	1309	268
to subscribing witness, void.....	1281	262
clear, cannot be controlled by words less clear.....	1322	270
of all testator's personal property, effect of.....	1331	271
of residue of estate, etc., effect of.....	1333	271
to heirs, relatives, etc., effect of.....	1334	271
to a class, includes whom.....	1337	272
vests, when.....	1341	272
how divested.....	1342	272
conditional, defined .....	1345	273
conditional vests, when .....	1347	273
to several persons, effect of.....	1350	273
what is ademption of.....	1351	273
of income, when accrues.....	1366	276
See LEGACY; WILL.		
<b>BID:</b>		
at auction, may be withdrawn, when.....	1794	348
<b>BIDDER:</b>		
at auction, may withdraw his bid, when.....	1794	348
goods at auction to be sold to highest.....	1797	348
authority of auctioneer from .....	2362	421
<b>BIGAMY:</b>		
ground for decree of nullity of marriage... ..	82	22

	Section.	Page.
<b>BILL OF EXCHANGE:</b>		
defined .....	3171	537
may give name of drawee in case of need.....	3172	538
may be in a set.....	3173	538
when must be in set.....	3174	538
presentment of one of a set sufficient.....	3175	538
where payable.....	3176	538
drawer of, has same obligations, etc., as indorser.....	3177	538
days of grace not allowed on.....	3181	539
apparent maturity of.....	3134	531
presumptive dishonor of, payable after sight.....	3133	531
<i>Acceptance of:</i>		
how made.....	3193	540
must be in writing.....	3194	541
must be absolute. ....	3194	541
how made, by consent of holder.....	3195	541
by refusal to return.....	3195	541
by separate instrument.....	3196	541
promise to accept, when equivalent to.....	3197	541
may be cancelled, when.....	3198	541
what is admitted by.....	3199	542
agent for collection must present for.....	2021	377
for honor, when allowed.....	3203	542
for honor, holder not bound to receive.....	3204	542
for honor, how made.....	3205	542
for honor, how enforced.....	3206	542
for honor, notice of dishonor not excused by.....	3207	543
<i>Payment of:</i>		
for honor, how made.....	3205	542
for honor, must be received by holder.....	3204	542
<i>Presentment of:</i>		
for acceptance, when made.....	3185	539
ib.....	3189	540
for acceptance, by whom made.....	3186	539
for acceptance to joint drawees.....	3187	540
for acceptance to drawee in case of need. ....	3188	540
for acceptance, when excused.....	3218	544
for payment, where made.....	3211	542
ib.....	3212	542
for payment, effect of delay in .....	3213	542
ib.....	3214	542
<b>INLAND:</b>		
defined .....	3224	544
<b>FOREIGN:</b>		
defined.....	3224	544
notice of dishonor of, how given.....	3225	545
protest of, by whom made.....	3226	545
protest of, how made.....	3227	545
protest of, where made.....	3228	545
protest of, when made.....	3229	545
protest of, when excused.....	3230	545
notice of protest of, how given.....	3231	545
notice of protest of, may be waived.....	3232	546
how paid, for honor.....	3233	546
damages for dishonor of.....	3234	546
ib.....	3235	546
interest as damages for dishonor of.....	3236	546
damages for dishonor of, how estimated in Federal money.....	3237	547
damages for dishonor of, how estimated in foreign money ..	3238	547
See NEGOTIABLE INSTRUMENT.		
<b>BILL OF LADING:</b>		
defined .....	2126	399
negotiable.....	2127	399
ib.....	2128	399

# INDEX.

629

	Section.	Page.
<b>BILL OF LADING: (Continued.)</b>		
effect of, on rights and duties of carrier.....	2129	390
consignor entitled to.....	2130	390
effect of refusal to give.....	2130	390
delivery to holder of, sufficient.....	2131	391
carrier may require surrender of, on delivery of goods.....	2132	391
effect of accepting, from carrier.....	2176	396
<b>BILL OF SALE:</b>		
included in term "grant".....	1053	218
<b>BLANK:</b>		
liability of party to negotiable instrument in.....	3126	530
<b>BOARDS OF TRADE:</b>		
may be incorporated.....	286	61
See CORPORATIONS.		
<b>BOND:</b>		
negotiable, remains so after dishonor.....	3262	549
See NEGOTIABLE INSTRUMENT; SECURITY.		
<b>BORROW:</b>		
shipmaster may, on credit of owner.....	2374	423
ship's manager has no power to, on cargo or ship.....	2389	425
<b>BORROWER:</b>		
<b>For Use:</b>		
does not acquire title.....	1885	359
must use what care.....	1886	359
of animals, obligations of.....	1887	359
must use what skill.....	1888	359
must repair negligent injuries.....	1889	359
may use thing, for what purpose.....	1890	359
must not re-lend.....	1891	359
must bear what expenses.....	1892	360
when lender must indemnify.....	1893	360
ib.....	1894	360
must return thing borrowed without demand.....	1895	360
must return thing borrowed, where.....	1896	360
<b>For Exchange:</b>		
acquires title.....	1904	361
must bear all expenses.....	1904	361
cannot be required to return loan before what time.....	1905	361
<b>Of Money:</b>		
must repay in current money.....	1913	362
See LOAN.		
<b>BOTTOMRY:</b>		
defined.....	3017	514
extent of insurable interest of ship hypothecated by.....	2660	461
owner may hypothecate upon, in any case.....	3018	514
shipmaster may hypothecate upon, when.....	3019	515
ib.....	3020	515
ib.....	3021	515
rate of interest upon.....	3022	515
rights of lender upon, when not necessary.....	3023	515
stipulation for personal liability under, void.....	3024	515
loan upon, when due.....	3026	515
ib.....	3025	515
lien of, how lost.....	3027	516
lien of, takes priority over other liens, when.....	3028	516
priority of several liens of.....	3029	516
See LIEN; RESPONDENTIA.		

	Section.	Page.
<b>BOUNDARIES :</b>		
to real property, by water.....	830	180
to real property, by ways.....	831	181
coterminous owners must maintain.....	841	181
<b>BRIDGE CORPORATIONS :</b>		
may be formed.....	286	61
must obtain license from Board of Supervisors.....	529	124
must make annual report.....	530	124
liability of, for failing to report.....	530	124
See CORPORATIONS.		
<b>BROTHER :</b>		
when takes by succession.....	1386	281
<b>BUILDING CORPORATIONS :</b> See LAND AND BUILDING CORPORATIONS.		
<b>BUILDINGS :</b>		
owner of life estate must keep, in repair.....	840	181
<b>BURDEN :</b>		
consent of party entitled to benefit necessary to transfer of....	1457	283
voluntary acceptance of benefit is assumption of.....	1589	317
he who takes benefit must bear.....	3521	507
<b>BURDEN OF PROOF :</b>		
where lies, to show want of consideration in instrument.....	1097	225
in action by creditor of mortgageor, where lies.....	2976	588
<b>BURIAL :</b>		
right of, may be held as an easement.....	801	176
right of, may be held as a servitude.....	802	176
<b>BUSINESS :</b>		
right of transacting, on land, an easement.....	801	176
good will of, subject of ownership.....	655	176
ib.....	993	200
good will of, defined.....	992	200
contract not to pursue, how far void.....	1673	329
general partner must not engage in separate.....	2436	431
ib.....	2437	431
liability of partner engaging in separate.....	2438	431
<b>BUYER :</b>		
when title to personal property passes to.....	1140	234
ib.....	1141	234
ib.....	1142	234
directions of, to be followed as to delivery.....	1757	343
implied warranty of seller, where goods are inaccessible to....	1771	345
when must pay price.....	1784	347
when must remove thing bought.....	1784	347
right of, to inspect warranted goods.....	1785	347
right of, in case of breach of warranty.....	1786	347
right of, at auction sale, without reserve.....	1796	348
by-bidding at auction, fraud against.....	1797	348
<b>BY-BIDDING :</b>		
a fraud.....	1797	348
<b>BY-LAWS :</b> See CORPORATIONS.		



# INDEX.

681

	Section.	Page.
<b>C</b>		
<b>CANCELLATION:</b>		
of grant of real property does not revest title.....	1060	219
of will, when operates as revocation.....	1291	264
of will, proof of, how made.....	1292	265
of written contract, effect of.....	1699	332
of written instrument, may be adjudged, when.....	3412	578
of written instrument, void on its face, not allowed.....	3413	578
of written instrument, partial, may be adjudged.....	3414	578
of acceptance by acceptor, when allowed .....	3198	541
See ALTERATION.		
<b>CAPITAL:</b>		
of special partnership must be stated in certificate.....	2479	436
payment of such, must be sworn to.....	2481	436
special partner must not withdraw.....	2493	439
effect of his withdrawing.....	2495	439
<b>CAPITAL STOCK:</b> See CORPORATIONS ; STOCK.		
<b>CARE:</b>		
degrees of.....	3558	603
<b>SLIGHT:</b>		
defined .....	3558	603
gratuitous depositary must use.....	1846	354
gratuitous employé must use.....	1975	370
gratuitous carrier of property must use.....	2114	388
<b>ORDINARY:</b>		
depositary for hire must use.....	1852	355
hirer must use.....	1928	364
employé for reward must use.....	1978	371
voluntary agent must use.....	2078	384
trustee must use.....	2259	408
gratuitous carrier of persons must use.....	2096	386
carrier of property for reward must use.....	2114	388
<b>GREAT:</b>		
borrower must use.....	1886	359
employé for his own benefit must use.....	1979	371
shipmaster must use.....	2034	380
carrier of messages for reward must use.....	2162	394
<b>UTMOST:</b>		
carrier of persons for reward must use.....	2100	386
carrier of messages by telegraph must use.....	2162	394
<b>CARELESSNESS:</b> See NEGLIGENCE.		
<b>CARGO:</b>		
sacrifice may be made for safety of.....	2148	393
such sacrifice must be borne ratably.....	2151	393
how valued on general average.....	2153	394
shipmaster agent for owners of.....	2375	423
ship's manager has not power to purchase.....	2389	425
seaworthiness of ship for purpose of insuring.....	2687	465
insurance on, when voyage is broken up.....	2707	467
shipmaster may sell, when.....	2379	424
shipmaster may hypothecate, when.....	2377	423
ib.....	3038	517
hypothecation of, under respondentia.....	3036	516
ib.....	3037	517
ib.....	3038	517
owner of, entitled to repayment from ship owner of amount paid under respondentia.....	3040	517
See GENERAL AVERAGE ; RESPONDENTIA.		

	Section.	Page.
<b>CARRIAGE :</b>		
contract of, defined.....	2085	385
different kinds of.....	2087	385
of persons, gratuitous.....	2096	386
of persons, for reward.....	2100	386
of property.....	2114	388
of messages.....	2161	394
shipmaster may make contract for.....	2376	423
See CARRIER; COMMON CARRIER.		
<b>CARRIER :</b>		
defined.....	2085	385
marine.....	2087	385
inland.....	2087	385
gratuitous, obligations of.....	2089	386
ib.....	2090	386
has insurable interest.....	2542	446
<b>Of PERSONS :</b>		
gratuitous, obligations of.....	2096	386
for reward, must use utmost care.....	2100	386
for reward, must provide safe vehicles.....	2101	387
for reward, must not overload vehicles.....	2102	387
ib.....	2185	398
for reward, must afford reasonable accommodation.....	2103	387
for reward, must travel without delay.....	2104	387
<b>Of PROPERTY :</b>		
for reward, must use ordinary care.....	2114	388
gratuitous, must use slight care.....	2114	388
must obey directions.....	2115	388
duties of, in case of conflicting orders.....	2116	388
must not stow freight on deck.....	2117	388
must not deviate.....	2117	388
must not vitiate insurance on freight.....	2117	388
must deliver freight, where.....	2118	389
ib.....	2119	389
must give notice of arrival, when.....	2120	389
may terminate liability, how.....	2121	389
may place in warehouse, when.....	2122	389
must give bills of lading... ..	2126	390
may deliver freight to holder of bill of lading.....	2130	391
when may demand surrender of bill of lading.....	2131	391
may throw freight overboard, when.....	2143	393
notice must be given to, to effect stoppage in transit.....	3679	523
<b>Freightage of :</b>		
defined.....	2110	387
when payable.....	2136	391
consignor, when liable for.....	2137	391
consignee, when liable for.....	2138	392
on what chargeable.....	2139	392
when apportioned.....	2140	392
ib.....	2141	392
ib.....	2143	392
in case of extra performance.. ..	2143	392
lien for.....	2144	392
<b>Of MESSAGES :</b>		
must deliver, how.. ..	2161	394
degree of care and diligence required of.....	2162	395
<b>Common :</b>		
defined.....	2163	395
must accept what is offered.....	2169	395
when must not give preference.....	2170	395
may give preference to the Government.....	2171	395
must start, when.....	2172	395
compensation of.....	2173	396

# INDEX.

633

	Section.	Page.
<b>CARRIER: (Continued.)</b>		
obligations of, how modified by agreement or notice.....	2174	396
cannot be relieved from certain liabilities.....	2175	396
effect of written contract of.....	2176	396
mortgage of property of, where to be recorded.....	2968	506
<b>Of Persons:</b>		
must carry luggage.....	2180	397
liability of, for luggage.....	2181	397
must deliver luggage, when.....	2183	397
must provide sufficient accommodation.....	2185	398
must provide vehicles.....	2184	397
regulations for conducting business.....	2186	398
may demand fare, when.....	2187	398
may eject passenger for non-payment.....	2188	398
cannot demand payment after ejection.....	2189	398
has lien on luggage.....	2190	398
<b>Of Property:</b>		
liability of, for loss.....	2194	399
ib.....	2200	399
liability of, for delay.....	2196	399
liability of, for negligence.....	2195	399
marine, liability of.....	2197	399
ib.....	2198	399
duties of, in respect to freight going beyond its route.....	2201	400
must give evidence of cause of loss.....	2202	400
obligations of, in other respects.....	2203	400
<b>Of Messages:</b>		
by telegraph, must transmit, in what order.....	2207	400
in other cases, must transmit, in what order.....	2208	401
liability for improper delay.....	2207	401
<b>CEMETERY CORPORATIONS:</b>		
may be formed.....	286	61
may hold how much land, and how may dispose of it.....	608	142
who are members, eligible to vote and hold office.....	609	142
may hold what amount of personal property..	610	143
may issue bonds to pay for grounds.....	611	143
proceeds, how disposed of.....	611	143
may take and hold property or use income thereof, how.....	612	143
interments in lot, and effect thereof.....	613	143
transfer of right, how only effected.....	613	144
lot owners previous to purchase to be members.....	614	144
See CORPORATIONS.		
<b>CERTIFICATE:</b>		
for continuing corporate existence of corporation.....	405	93
of consent of parties to execution of power.....	907	192
of shipmaster, as to exertion of seamen to save ship.....	2059	382
of officer taking proof of instruments.....	1186	243
ib.....	1189	244
of Judge granting homestead petition.....	1263	258
of proof of loss under insurance, when dispensed with.....	2637	459
of discharge of mortgage to be filed with Recorder.....	2949	502
ib.....	2950	502
on indentures of apprenticeship.....	266	55
ib.....	275	56
false, by officer of corporation.....	316	72
<b>OF ACKNOWLEDGMENT:</b>		
form of.....	1175	240
form of, by attorney in fact.....	1176	240
form of, by married woman.....	1180	241
when interpreter employed, such fact need not be stated in....	1182	242
party may have action to correct defect in.....	1192	245

	Section.	Page.
<b>CERTIFICATE: (Continued.)</b>		
<b>OF INCORPORATION:</b>		
from Secretary of State.....	297	54
prerequisites to issuing.....	294	66
<b>OF MARRIAGE:</b>		
how made and what to contain.....	74	20
copies of, may be given to parties.....	74	20
original to be filed with Recorder.....	74	20
<b>PARTNERSHIP:</b>		
as to formation of special.....	2479	436
such to be acknowledged and recorded.....	2480	437
as to formation of mining.....	2516	442
stating name of, where to be filed.....	2469	435
copies of such, as evidence.....	2471	435
of admission of new members.....	2508	441
<b>OF STOCK:</b>		
how issued.....	323	74
personal property.....	324	75
certain, transferable.....	576	135
transfer of, how effected.....	324	75
<b>CHAMBERS OF COMMERCE:</b>		
may be incorporated.....	286	61
See CORPORATIONS.		
<b>CHARACTER:</b>		
right of protection from injury to.....	43	11
defamation of, how effected.....	44	11
threats of injury to render contract voidable.....	1567	311
ib.....	1570	312
<b>CHARTER:</b>		
corporation, when forfeits.....	288	64
See ARTICLES OF INCORPORATION; FRANCHISE.		
<b>CHARTERER:</b>		
has insurable interest.....	2684	482
master or part owner of ship may be.....	1959	368
<b>CHARTER PARTY.</b>		
defined and regulated.....	1959	368
shipmaster may enter into, in foreign port.....	2376	423
ship's manager may enter into.....	2388	425
certain insurable interest exists under.....	2663	463
<b>CHATTEL INTEREST:</b>		
defined.....	765	171
See PERSONAL PROPERTY.		
<b>CHATTEL MORTGAGE: See MORTGAGE, PERSONAL.</b>		
<b>CHATTEL REAL:</b>		
defined.....	765	171
limitation of.....	770	171
when estate for life of third person becomes.....	766	171
<b>CHECK:</b>		
defined.....	3254	548
negotiable instrument.....	3095	525
effect of delay in presentment of.....	3255	548
title of indorsee to, without notice of dishonor.....	3255	548
<b>CHILD:</b>		
unborn, for what purpose deemed existing.....	21	8

	Section.	Page.
<b>CHILD: (Continued.)</b>		
abduction of, forbidden.....	48	18
of annulled marriage, how may succeed.....	84	23
of annulled marriage, custody of.....	85	24
of divorced parents, legitimacy of.....	145	36
ib.....	146	36
of divorced parents, custody of.....	138	35
of divorced parents, support of.....	139	35
liability of community property for support, etc., of.....	143	36
parents, on separating, may make provision for support of....	159	38
legitimacy of, born in wedlock.....	193	43
legitimacy of, born out of wedlock.....	194	43
who may dispute legitimacy of.....	195	43
obligation of parents for support and education of.....	196	43
custody of legitimate.....	197	43
when neither parent has superior right to custody of.....	198	43
when parent may bring action for exclusive control of.....	199	44
custody of illegitimate.....	200	44
allowance to parent for support and education of.....	201	44
parent cannot control property of.....	202	44
may bring action for abuse of parental authority.....	203	44
when parental authority over, ceases.....	204	44
remedy when parent dies without providing for support of....	205	44
when parent is liable for necessities supplied to.....	207	45
when parent is not liable for necessities supplied to.....	208	45
husband not bound to support wife's, by former marriage.....	209	45
compensation and support of adult.....	210	45
parent may relinquish custody and services of.....	211	45
wages of minor.....	212	46
right of parent as to residence of.....	213	46
when wife may obtain custody of.....	215	46
right of posthumous, to take property.....	698	161
birth of posthumous, defeats certain future interests.....	739	166
born after making of will, takes by succession.....	1305	267
grandchild of testator unprovided for by will, when succeeds..	1306	267
share of, born after making will, out of what property taken..	1307	267
duress of, avoids contract of parent, when.....	1569	312
ib.....	1570	312
advancement to, during lifetime of testator, unprovided for		
by will, effect of.....	1308	268
See MINOR; ADOPTION; ILLEGITIMATE CHILD.		
<b>CHILDREN:</b>		
defined .....	3561	604
See CHILD.		
<b>CHURCH:</b>		
right of a seat in, may be held as an easement.....	801	176
right of a seat in, may be held as a servitude.....	802	176
corporations for maintenance of, may be formed.....	286	61
<b>CIRCUMSTANCES:</b>		
may be considered in interpreting ambiguous grant.....	1069	220
may be considered in interpreting contract.....	1647	325
<b>CIRCUMVENTION:</b>		
contract obtained through, cannot be specifically enforced....	3391	575
See DECEIT; FRAUD.		
<b>CITY:</b>		
use of land of, not granted to corporations.....	367	86
property of, how acquired by corporation .....	372	87
lease of lots in, limitation on.....	718	163
construction of power to lease lots in.....	925	195

	Section.	Page.
<b>CLERK :</b>		
county, duty of, regarding marriage licenses.....	70	20
county, articles of incorporation to be filed with.....	297	66
county, certificate of formation of special partnership to be filed with.....	2487	437
county, notice of dissolution of special partnership to be filed with.....	2509	441
county, must keep register of partnership names.....	2470	435
of Court of record, empowered to take acknowledgments.....	1170	238
of Supreme Court, may take acknowledgments.....	1169	235
<b>CODE :</b>		
title of.....	1	1
when takes effect.....	2	2
no Common Law, where the law is prescribed by.....	7	3
divisions of.....	10	3
and Common Law parts of same system.....	3449	602
declaration of Common Law principal by, effect of.....	3550	602
ib.....	3551	602
construction of statutes in derogation to Common Law not applicable to.....	3552	602
construction of.....	3553	602
ib.....	3554	602
<b>CODICIL :</b>		
execution of, republishes will.....	1286	263
revocation of will, revokes.....	1304	267
included in term " will ".....	1376	277
<b>COHABITATION :</b>		
when a bar to nullity of marriage.....	82	22
unsafe, ground for divorce.....	94	25
See CONDONATION ; MARRIAGE.		
<b>COLLATERAL WARRANTIES :</b>		
abolished.....	1127	232
<b>COLLECTION :</b>		
agent for, duties of.....	2121	377
partner acting in liquidation may make.....	2461	434
effect of warranty of.....	2500	481
<b>COLLEGES :</b>		
corporations for maintenance of, may be formed.....	286	61
See CORPORATIONS.		
<b>COLLISION :</b>		
rules for avoiding.....	970	202
from breach of rules, who can recover damages for.....	971	203
breach of such rules imply wilful default.....	972	203
losses occasioned by, how apportioned.....	973	203
<b>COLLUSION :</b>		
defined.....	113	29
divorce must be denied on showing.....	115	29
presumption of, in certain case.....	125	32
absence of, to be affirmatively stated in complaint.....	131	34
<b>COMMERCIAL PAPER :</b> See NEGOTIABLE INSTRUMENT.		
<b>COMMISSIONER OF DEEDS :</b>		
may take acknowledgments pursuant to special statutes.....	1171	239
ib.....	1172	239

# INDEX.

637

	Section.	Page.
<b>COMMON CARRIER: See CARRIER, COMMON.</b>		
<b>COMMON LAW:</b>		
the rule of decision in Courts of this State.....	5	2
divisions of.....	6	3
evidence of, where found.....	5	2
where non-existent.....	7	3
and Code, one system.....	3550	602
effect of Code declaring a principal of.....	3550	602
ib.....	3551	602
rule of construction of statutes in derogation of, not applica- ble to Code.....	3552	602
<b>COMMUNICATION:</b>		
privileged.....	47	13
private, in writing, ownership of.....	985	209
of consent, essential to contract.....	1565	311
of consent to contract, how made.....	1581	315
ib.....	1582	315
of consent to contract, when complete.....	1583	316
upon insurance, what must be made.....	2563	449
upon insurance, what need not be made.....	2564	450
upon insurance, of nature, etc., of interest not required, when when such is required.....	2568	450
upon insurance, on matters of judgment, unnecessary.....	2587	453
upon reinsurance, what required.....	2570	450
upon marine insurance, what required.....	2647	460
of acceptance of offer to guaranty, necessary.....	2669	462
See REPRESENTATION; CONCEALMENT.	2795	481
<b>COMMUNITY PROPERTY:</b>		
defined.....	164	39
ib.....	687	160
when Court may resort to, for alimony.....	141	35
power of husband over.....	178	40
disposition of, on divorce.....	147	36
ib.....	148	37
ib.....	149	37
distribution of, on death of wife.....	1396	283
distribution of, on death of husband.....	1397	283
<b>COMPENSATION:</b>		
may cure delay, when.....	1492	299
for errors of description, agreement for, does not prejudice right to rescind, when.....	1690	331
of depositary for hire.....	1853	355
of finder.....	1867	357
for loan, called interest.....	1915	362
borrower entitled to certain.....	1892	360
ib.....	1894	360
duties of employé for.....	1978	371
of employé continuing services after death of employer.....	1998	374
of employé dismissed for fault.....	2002	375
of employé quitting for cause.....	2003	375
in case contract of service is continued beyond two years.....	1980	371
managing owner of ship not entitled to.....	2072	384
of voluntary depositary.....	2078	384
of common carrier.....	2173	396
of trustees.....	2273	410
ib.....	2274	410
partner not entitled to.....	2413	428
lienor not entitled to.....	2593	494
the relief generally given by law.....	3275	553
for mistake, when allowed on specific performance.....	3391	575

	Section.	Page.
<b>COMPENSATION: (Continued.)</b>		
for partial failure to perform, on specific performance .....	3392	575
may be required on rescission, when .....	3408	578
of assignee for benefit of creditors .....	3471	590
See <b>WAGES; SALARY.</b>		
<b>COMPLAINT:</b>		
in action for divorce, additional affirmative statements re-		
quired in .....	131	34
<b>COMPOUND INTEREST: See INTEREST.</b>		
<b>COMPUTATION:</b>		
of term of suspension of alienation in execution of power....	912	193
of period of minority .....	18	7
of time .....	3581	607
<b>CONCEALMENT:</b>		
of facts in certain case renders condonation void .....	129	39
by trustee, when fraudulent .....	2228	404
ib .....	2234	405
partner must not obtain advantage by .....	2411	427
<b>IN INSURANCE:</b>		
in general, defined .....	2561	449
entitles injured party to rescind .....	2562	449
when improper .....	2563	449
when proper .....	2564	450
concerning warranty .....	2569	450
when material .....	2565	450
of private judgment allowed .....	2570	451
<b>IN MARINE INSURANCE:</b>		
what is improper .....	2669	462
of belief of third person .....	2670	462
when presumed .....	2671	463
effect of, in certain cases .....	2672	463
<b>IN FIRE INSURANCE:</b>		
does not prejudice unless fraudulent .....	2752	474
<b>CONDITIONS:</b>		
in indentures of apprenticeship .....	271	55
ib .....	272	56
of ownership .....	707	162
kinds of, of ownership .....	708	162
of ownership, when void .....	709	162
nominal, in direction for execution of power, may be disre-		
garded .....	905	192
restraining marriage, when void .....	710	163
restraining alienation, when void .....	711	163
grant may be deposited with third person, to be delivered on		
performance of .....	1059	219
delivery of grant to grantee on, void .....	1056	218
tenant without notice not liable for breach of, of lease .....	1126	223
kinds of, in conditional obligations .....	1434	291
impossible or unlawful, void .....	1441	292
performance of, when excused .....	1440	292
offer of performance must be free from what .....	1494	300
of proposal, must be fulfilled by acceptance .....	1582	315
of proposal, performance of, is acceptance .....	1584	316
failure to perform revokes proposal .....	1587	316
written, governing auction sale, not to be modified orally .....	1795	340
<b>PRECEDENT:</b>		
in obligations, what .....	1436	291
when must be performed .....	1439	292
what may depend on performance of .....	1493	301



	Section.	Page.
<b>CONDITIONS: (Continued.)</b>		
grant on, only an executory contract.....	1058	218
in will, what.....	1346	273
in will, effect of.....	1347	273
in will, when deemed performed.....	1348	273
<b>SUBSEQUENT:</b>		
right of re-entry for breach of, transferable .....	1046	218
property to be reconveyed on non-performance of.....	1057	218
in will, what.....	1349	273
in obligations, what. ....	1438	291
<b>CONCURRENT:</b>		
in obligations, what.....	1437	291
what may depend on performance of.....	1498	301
<b>CONDITIONAL:</b>		
fee abolished.....	762	170
delivery cannot be made.....	1056	218
will, when may be denied probate.....	1280	262
devise or bequest, what.....	1345	273
devise or bequest, when vests.....	1347	273
obligation.....	1434	291
obligation, prerequisites to enforcing.....	1439	292
obligation, performance of, when excused.....	1440	292
obligation, liability of guarantor on.....	2808	483
obligation, involving forfeiture, how construed.....	1442	292
offer of performance, when valid.....	1494	300
See <b>CONDITIONS</b> .		
<b>CONDONATION:</b>		
desertion cured by soliciting.....	103	27
refusal of, is desertion by the party refusing.....	103	27
divorce must be denied on showing.....	116	29
requisites of.....	117	29
evidence of.....	118	30
when operates to bar divorce.....	119	30
when made void.....	120	30
how revoked.....	121	30
bar to recriminatory defence, when.....	123	31
presumption of, in certain case.....	126	32
absence of, to be affirmatively stated in complaint.....	131	34
<b>CONFIDENCE:</b>		
unfair use of, is undue influence.....	1575	313
See <b>TRUST</b> .		
<b>CONFINEMENT:</b>		
unlawful or fraudulent, avoids contract.....	1569	313
master of ship may subject seamen to.....	2037	379
master of ship may subject passengers to.....	2038	379
See <b>DURESS</b> .		
<b>CONFUSION OF GOODS:</b>		
ownership of things formed by.....	1025	214
ib.....	1029	214
ib.....	1030	215
<b>CONNIVANCE:</b>		
defined .....	113	29
divorce must be denied on showing.....	112	29
how manifested.....	114	29
presumption of, in certain case.....	126	32
absence of, to be affirmatively stated in complaint.....	131	34
contract obtained through, voidable.....	1689	381

	Section.	Page.
<b>CONSENT :</b>		
of parties necessary to marriage.....	55	16
alone does not constitute marriage.....	55	16
who are capable of giving, to marriage.....	55	16
to marriage, how manifested and proved.....	57	17
separation by, not desertion.....	99	27
to separation, a revocable act.....	102	27
corrupt.....	113	29
corrupt, how manifested.....	114	29
mutual, sufficient consideration for agreement to separate.....	161	33
written, of mother, necessary to transfer custody of child.....	197	43
of wife, necessary for married man to adopt child.....	223	47
of child's parents necessary, to adopt child.....	224	47
of child, when necessary for its adoption.....	225	48
for apprenticeship of child.....	265	54
ib.....	266	55
to execution of power, who must give.....	907	192
to execution of power, how given.....	908	192
to execution of power by wife, husband need not give.....	897	190
of landlord necessary to attornment to stranger by tenant.....	1128	233
of party entitled to benefit necessary to transfer of burden.....	1457	293
contract may be rescinded by mutual.....	1689	331
thing obtained without, of owner, to be restored.....	1712	336
of depositor necessary to use of deposit by depositary.....	1835	353
to contract, essentials of.....	1565	311
to contract, when not free, not void but voidable.....	1566	311
to contract, apparent, when not free.....	1567	311
to contract, when deemed to be obtained through fraud.....	1568	311
to contract, duress in obtaining, defined.....	1569	312
to contract, menace in obtaining, defined.....	1570	312
to contract, fraud in obtaining, defined.....	1571	312
to contract, actual fraud in obtaining, defined.....	1572	313
to contract, constructive fraud in obtaining, defined.....	1573	313
to contract, mistake in obtaining, defined.....	1576	314
ib.....	1577	314
ib.....	1578	315
ib.....	1579	315
to contract, undue influence in obtaining, defined.....	1575	313
to contract, when deemed mutual.....	1580	315
to contract, when deemed communicated.....	1581	315
ib.....	1582	315
to contract, when deemed complete.....	1583	316
of proposal to contract, when deemed acceptance.....	1584	316
of principal necessary to release of factor.....	2030	378
voluntary interference with property without.....	2078	384
of beneficiary necessary to allow trustee to hold adverse interest.....	2233	405
mutual, necessary to create trust.....	2251	407
not necessary to rescission of ratification.....	2314	415
of all, necessary to creation of partnership.....	2397	426
unanimous, necessary to admission of new partner.....	2397	426
not necessary to create guaranty.....	2758	479
<b>CONSIDERATION :</b>		
mutual consent to separation sufficient.....	160	38
effect of transfer where paid by third party.....	853	163
not necessary to validity of voluntary transfer.....	1040	316
written instrument prima facie imports.....	1096	255
ib.....	1629	323
on whom falls the burden of proof to show want of sufficient.....	1097	225
presumed, in novation.....	1532	306
old obligation extinguished by new.....	1541	307
good, defined.....	1605	318
how far moral obligation is good.....	1606	318

# INDEX.

641

	Section.	Page.
<b>CONSIDERATION : (Continued.)</b>		
must be lawful.....	1607	319
effect of illegality of.....	1608	319
may be executed or executory.....	1609	319
executory, need not be specified.....	1610	319
executory, how ascertained.....	1611	320
effect of impossibility of ascertaining.....	1612	320
ib.....	1613	320
contract may be altered without new.....	1697	332
failure of, when ground for rescission.....	1689	331
not necessary to create agency.....	2307	414
necessary to guaranty, when.....	2792	479
need not be expressed in written guaranty.....	2793	479
presumption of, in negotiable instruments.....	3104	526
effect of want of, in negotiable instruments.....	3123	529
<b>CONSIGNEE :</b>		
defined.....	2110	387
carrier must obey, when.....	2116	388
freight to be delivered to.....	2118	389
ib.....	2119	389
notice of arrival of freight to be given to.....	2120	389
when cannot be found, freight may be stored.....	2122	389
when refuses to accept, freight may be stored.....	2121	389
liable for freightage, when.....	2138	392
effect of acceptance of part performance by.....	2141	392
assent of, to special contract, how proved.....	2176	396
consignor may stop goods in transit on insolvency of.....	3076	422
what is insolvency of.....	3077	522
<b>CONSIGNOR :</b>		
defined.....	2110	387
when carrier must obey.....	2116	388
freight not to be stored on deck without consent of.....	2117	388
presumed to be liable for freightage.....	2137	391
assent of, to modification of carrier's obligation, how proved.....	2176	396
when may stop goods in transit.....	3076	522
<b>CONSISTENCY :</b>		
grant to be interpreted so as to give.....	1071	221
See INTERPRETATION.		
<b>CONSTITUTION :</b>		
defined.....	4	2
<b>CONSTRUCTION :</b>		
of certain remainders.....	781	173
of certain powers.....	934	196
of certain leasing powers.....	925	195
of Code Covenants.....	1109	228
of devise of land by will.....	1310	268
of the Code.....	3554	602
See INTERPRETATION.		
<b>CONSTRUCTIVE :</b>		
delivery of grant.....	1061	219
ib.....	1172	239
total loss under marine insurance.....	2705	467
fraud, defined.....	1573	313
notice, defined.....	3566	604
<b>CONSUL :</b>		
of the United States may take acknowledgment.....	1172	239

	Section.	Page.
<b>CONTEMPORANEOUS:</b>		
exposition is the best.....	3535	599
<b>CONTEMPT:</b>		
officers authorized to take acknowledgments may punish for...	1190	244
<b>CONTINGENT INTEREST:</b>		
defined.....	695	161
not void because improbable.....	697	161
<b>CONTINGENT REMAINDER:</b>		
on prior remainder.....	772	172
how created.....	773	173
on a term of years.....	777	173
<b>CONTINUANCE:</b>		
of existence of corporations, how effected under the Code.....	287	63
ib.....	404	93
ib.....	405	93
<b>CONTINUING GUARANTY:</b>		
defined.....	2814	494
when may be revoked.....	2815	484
letter of credit deemed, when.....	2864	490
<b>CONTRACT:</b>		
defined.....	1549	309
rights of persons, considered minors under law of other State,		
not impaired concerning.....	23	8
minor may make, subject to his power of disaffirmance.....	28	9
of minor, when and how disaffirmed.....	29	9
minor or insane person cannot disaffirm, for necessities.....	30	9
when person of unsound mind may make.....	33	9
when person of unsound mind cannot make.....	34	9
person entirely without understanding cannot make.....	32	9
marriage a personal relation arising out of civil.....	65	16
husband and wife may make.....	158	39
husband and wife cannot alter their legal relations by, except	159	38
marriage settlement, how executed.....	184	41
marriage settlement must be acknowledged and recorded.....	185	41
effect of recording or non-recording of marriage settlement....	186	41
minor may make marriage settlement.....	187	42
of apprenticeship of alien minor.....	275	56
executed, voluntary transfer is.....	1040	316
executed, defined.....	1661	327
executory, defined.....	1661	327
executory, grant on condition precedent is.....	1058	218
executory, a real instrument, when.....	1092	223
executory, witness not necessary to its validity, when.....	1098	225
executory, of marriage must be in writing.....	1624	321
executory, authority to agent to execute must be in writing....	1732	339
executory, form of execution of.....	1735	339
lien may be created by.....	2884	493
non-negotiable written, transferable.....	1459	294
novation a.....	1535	306
for benefit of third person may be enforced by him, when....	1559	310
with seamen, restrictions on.....	2053	381
what, not allowed in negotiable instrument.....	3093	525
essential elements of.....	1550	309
when presumed to be joint and several.....	1659	327
ib.....	1660	327
for forfeiture of property subject to a lien, void.....	2889	493
in restraint of right of redemption from lien, void.....	2890	493

	Section.	Page.
<b>CONTRACT: (Continued.)</b>		
<i>Parties to:</i>		
who may be.....	1556	310
when minors, etc., may be.....	1557	310
must be capable of identification.....	1558	310
<i>Consent to:</i>		
essential elements of.....	1565	311
when not free, not void but voidable.....	1566	311
apparent, when not free.....	1567	311
when deemed to be obtained through fraud.....	1568	311
duress in obtaining, defined.....	1569	312
menace in obtaining, defined.....	1570	312
fraud in obtaining, defined.....	1571	312
actual fraud in obtaining, defined.....	1572	313
constructive fraud in obtaining, defined.....	1573	313
undue influence in obtaining, defined.....	1575	313
mistake in obtaining, defined.....	1576	314
mistake of fact in obtaining, defined.....	1577	314
mistake of law in obtaining, defined.....	1578	315
mistake of foreign law in obtaining, defined.....	1579	315
when deemed mutual.....	1580	315
when deemed communicated.....	1581	315
ib.....	1582	315
when deemed complete.....	1583	316
proposal of, when deemed accepted.....	1584	316
acceptance of proposal must be absolute.....	1585	316
revocation of proposal.....	1586	316
revocation, how made.....	1587	316
voidable, may be ratified.....	1588	317
may be rescinded.....	1589	331
acceptance of benefit, when deemed.....	1589	317
<i>Object of:</i>		
defined.....	1595	317
must be lawful, possible and ascertainable.....	1596	317
when deemed possible.....	1597	317
when illegality of, renders contract wholly void.....	1598	317
when illegality of, renders contract partly void.....	1599	318
<i>Consideration:</i>		
good, defined.....	1605	318
how far moral obligation is good.....	1606	318
must be lawful.....	1607	319
effect of illegality of.....	1608	319
may be executed or executory.....	1609	319
executory need not be specified.....	1610	319
executory, how ascertained.....	1611	320
effect of impossibility of ascertaining.....	1612	320
ib.....	1613	320
contract may be altered without new.....	1697	332
<i>Creation of:</i>		
by express words.....	1620	321
by implication.....	1621	321
orally.....	1622	321
by writing.....	1623	321
ib.....	1624	321
by writing, supersedes oral negotiations.....	1625	322
by writing, when takes effect.....	1626	322
by writing, delivery necessary to.....	1627	322
provisions abolishing private seals apply to.....	1629	323
<i>Interpretation of:</i>		
to be uniform.....	1635	323
to effectuate mutual intention.....	1636	324
to ascertain intention.....	1637	324
to be governed by language used.....	1638	324
to be governed by written words.....	1639	324

	Section.	Page.
<b>CONTRACT: (Continued.)</b>		
exception in cases of fraud.....	1640	324
entire contract to be considered in.....	1641	324
several contracts to be taken together in.....	1642	324
to be favorable to its validity.....	1643	325
according to ordinary sense of words.....	1644	325
technical words in.....	1645	325
what law governs.....	1646	325
by surrounding circumstances.....	1647	325
subject matter to be considered in.....	1647	325
to be restrained by its object.....	1648	325
uncertainty in to be construed against, when.....	1649	325
ib.....	1654	326
general intent to prevail in.....	1650	326
original and written parts in, to prevail.....	1651	326
repugnances in.....	1652	326
inconsistent words to be rejected in.....	1653	326
what stipulations implied in.....	1655	326
incidents to contract implied in.....	1656	326
in respect to time of performance.....	1657	327
time, when deemed essential in.....	1658	327
<i>Unlawful:</i>		
defined.....	1667	328
certain contracts declared.....	1668	328
imposing penalties.....	1669	328
fixing damages.....	1670	328
exception.....	1671	328
restraining legal proceedings.....	1672	328
restraining trade, when.....	1673	329
restraining trade, when not.....	1674	329
ib.....	1675	329
restraining marriage.....	1676	330
<i>Extinction of:</i>		
in general.....	1682	330
by rescission.....	1688	331
by rescission, in what cases.....	1689	331
by rescission, how effected.....	1691	331
certain stipulations do not prevent rescission.....	1690	331
by alteration.....	1697	332
by cancellation and destruction.....	1699	332
by unauthorized alteration.....	1700	333
<b>CONTRIBUTION:</b>		
joint debtor may require, when.....	1429	290
release of joint debtors does not affect rights of others to.....	1543	307
to general average loss.....	2152	393
between insurers, in case of double insurance.....	2642	459
between insurers, in case of over insurance.....	2621	457
in case of loss under marine insurance.....	2745	473
between co-sureties.....	2848	488
<b>CONTROLLER:</b>		
corporations to transmit selection of right of way to.....	371	87
<b>CONTROVERSY:</b>		
between ship owners, how settled.....	964	201
<b>CONVERSION:</b>		
directed by will, when takes effect.....	1338	272
extinction of lien by.....	2910	496
of personal property, damages for wrongful.....	3336	565
ib.....	3338	565
<b>CONVEYANCE:</b>		
minor may make, subject to his power of disaffirmance.....	28	8

	Section.	Page.
<b>CONVEYANCE: (Continued.)</b>		
when person of unsound mind may make.....	33	9
grantor may reserve powers in.....	891	189
instrument executing power deemed a.....	910	192
included in word "grant".....	1053	218
effect of, by married woman.....	1181	242
made heretofore, governed by then existing laws.....	1195	245
See GRANT; TRANSFER.		
<b>CONVICTION:</b>		
of felony, when ground for divorce.....	92	25
of felony, when not a ground for divorce.....	124	31
<b>COPY:</b>		
of indentures of apprenticeship, where to be deposited.....	273	56
certified, of articles of incorporation as evidence.....	298	67
of marriage certificate may be furnished parties.....	74	20
inferior to original.....	1651	326
See DUPLICATE.		
<b>CORPORATIONS:</b>		
defined.....	283	60
what are public.....	284	60
how may continue their existence under this Code.....	287	63
must commence to perpetuate, when.....	288	64
what are private.....	284	60
for what purpose may be formed.....	286	61
name of instrument creating.....	289	64
articles of incorporation, what to contain.....	290	64
certain, to state what additional facts in articles.....	291	65
prerequisites to filing articles of incorporation of certain.....	292	65
for profit, prerequisites to filing articles of incorporation.....	293	65
qualifications of corporators, and number of.....	295	66
articles of incorporation of, where to be filed and certificate thereon.....	297	66
term of existence.....	297	66
misnomer does not invalidate instrument.....	359	83
dealers with, cannot question its existence.....	360	84
may acquire real estate.....	365	85
right of way granted to.....	366	86
limitation of such right.....	367	86
certain appurtenances granted to.....	368	86
forfeit grants from State, by neglect.....	369	86
when lands of, revert to State.....	370	86
selection for right of way, how proved and certified.....	371	87
how may acquire town and county property.....	372	87
how may acquire lands of minors and insane.....	373	87
franchise may be sold under execution.....	388	90
duties of purchaser of franchise.....	389	90
ib.....	390	90
sale of franchise not to affect powers or liabilities of.....	391	91
may redeem franchise.....	392	91
where proceedings under execution may be had against.....	393	91
how may extend their corporate existence.....	404	93
ib.....	405	93
cannot take by will.....	1275	261
<b>Assessment of Stock:</b>		
Directors may levy.....	331	76
limit of, and how levied.....	332	77
majority of Board of Directors may levy.....	333	77
order for levying to contain, what.....	334	77
notice of, and its form.....	335	77
publication and service of notice of.....	336	78
delinquent notice and its form and contents.....	337	78
ib.....	338	79

	Section.	Page.
<b>CORPORATIONS: (Continued.)</b>		
publication of delinquent notice.....	339	79
sale of stock to pay.....	341	79
not to be invalidated.....	346	81
action to recover stock sold for delinquent.....	347	81
<i>By-laws:</i>		
adoption of, when, how and by whom made.....	302	68
to be adopted at first meeting.....	303	68
to be recorded.....	304	68
how amended.....	304	68
may be made for certain purposes.....	305	69
must provide for annual election of Directors.....	307	69
<i>Debts:</i>		
not to be created beyond actual subscribed stock.....	327	76
ib.....	315	72
when officer becomes liable for.....	316	72
ib.....	327	76
liability of stockholder for.....	322	74
ib.....	357	80
<i>Directors:</i>		
election of, after incorporation.....	303	68
how many, and qualifications of.....	306	69
powers of.....	306	69
election of, how, when and by whom.....	307	69
organization of Board of.....	308	70
may postpone election, when.....	313	71
must make dividends, how.....	315	72
liability of, in certain cases, to creditors.....	315	72
ib.....	327	76
vacancy in office of, how filled.....	306	69
may levy assessments.....	331	76
ib.....	333	77
on dissolution, to be trustees for creditors.....	401	92
<i>Dividends:</i>		
how made and how not to be made.....	315	72
on shares of married women, how paid.....	325	75
<i>Dissolution:</i>		
by forfeiture for non-user.....	360	84
when land reverts to State on.....	370	86
proceedings for.....	399	92
ib.....	403	92
appointment of Receivers upon.....	400	92
Directors to be trustees for creditors upon.....	401	92
powers of such trustees.....	402	92
<i>Elections:</i>		
of first Directors.....	303	68
of subsequent Directors.....	307	69
to fill vacancies.....	309	70
majority of stock to be represented at.....	311	71
who may vote at.....	312	71
complaints and quo warrantos, etc., regarding.....	314	71
may be postponed.....	313	71
<i>Examination of:</i>		
how and by whom made.....	382	89
made by Legislature.....	383	89
<i>Meetings:</i>		
when first to be called.....	303	68
time, manner and place of, to be specified in by-laws.....	305	68
officers to be removed only at general.....	309	70
by-laws only to be amended at special.....	304	68
Justice of Peace may order.....	310	70
who may vote at.....	312	71
by consent to be valid.....	317	73
majority must be present at.....	311	71



# INDEX.

647

	Section.	Page.
<b>CORPORATIONS: (Continued.)</b>		
proceedings at, to be binding.....	318	73
for extension and continuation of corporate existence.....	404	93
ib.....	405	93
<i>Name:</i>		
error in, in articles of incorporation, not to invalidate instrument.....	359	83
to be stated in articles of incorporation.....	290	64
<i>Officers:</i>		
by-laws to regulate compensation and duties of.....	305	69
Directors to elect President, Treasurer and Secretary.....	308	70
proceedings for removal of.....	309	70
liability of, making false certificate, etc.....	316	73
married women may become.....	285	60
oath of, on filing articles of incorporation.....	294	66
election to fill vacancies.....	318	73
<i>Organization:</i>		
dissolution for the want of.....	360	84
within what time to be effected.....	360	84
<i>Powers:</i>		
defined and prescribed.....	354	82
limitation of.....	355	83
banking expressly prohibited.....	356	83
who may exercise.....	358	83
when forfeited for non-user.....	360	84
to increase or diminish capital stock.....	361	84
not to be affected by sale of franchise.....	391	91
<i>Records:</i>		
how kept and what to contain.....	377	88
"stock and transfer" book.....	378	88
<i>Stock:</i>		
amount to be subscribed before incorporating.....	292	65
oath of officer to subscription of.....	294	66
majority of subscribed, necessary to adoption of by-laws.....	302	68
majority of subscribed, necessary to election of Directors.....	303	68
ib.....	307	69
two-thirds of subscribed, necessary to amend by-laws.....	304	68
two-thirds of subscribed, necessary to removal of officers.....	309	70
majority of subscribed, constitutes quorum.....	311	71
dividends not to be made from capital.....	315	72
debts not to be incurred beyond subscribed.....	315	72
ib.....	327	76
capital must not be increased or diminished except.....	315	72
ib.....	361	84
on dissolution, may be divided.....	315	72
who may enforce subscription.....	321	74
certificates of, how issued.....	323	74
transfer of shares of.....	325	75
transfer of shares of, held by married women.....	325	75
transfer of shares of, of non-residents.....	326	75
hypothecated shares of, how voted.....	312	74
ib.....	322	79
sale of delinquent.....	323	79
when acquires jurisdiction over certain.....	340	79
may buy its own, when.....	343	80
disposition of, where corporation is purchaser.....	344	81
when corporation may purchase delinquent.....	341	79
ib.....	342	79
disposition of delinquent, purchased by corporation.....	343	80
ib.....	344	80
action for recovery of, sold for delinquent assessments.....	347	31
liability of stockholders on.....	357	88
defined.....	407	93
<i>Stockholders:</i>		
entitled to how many votes.....	302	68

	Section.	Page.
<b>CORPORATIONS: (Continued.)</b>		
notice to be given to, of meetings.....	307	69
who has hypothecated stock, when may vote.....	312	71
ib.....	322	74
liability of, for debts of corporation .....	322	74
ib.....	357	83
defined.....	407	93
<b>AGRICULTURAL FAIR:</b>		
may be formed.....	286	61
may acquire and hold how much real estate.....	620	144
shall not contract debts in excess of amount on hand.....	621	144
not for profit.....	622	145
may fix fee, etc., for membership.....	622	145
<b>ART:</b>		
may be formed.....	286	61
married women may become corporators, etc., of.....	285	60
<b>BENEVOLENT:</b>		
may be formed.....	286	61
married women may become corporators, etc., of.....	285	60
<b>BOARDS OF TRADE:</b>		
may be formed.....	286	61
<b>BRIDGE, FERRY, WHARF, CHUTE AND PIER:</b>		
may be formed.....	286	61
to obtain license from Board of Supervisors.....	529	124
annual report of.....	530	124
damages for failing to report.....	530	124
<b>BUILDING: See LAND AND BUILDING.</b>		
<b>CANAL: See WATER AND CANAL.</b>		
<b>CEMETERY:</b>		
may be formed.....	286	61
how much land may be held, and how disposed of.....	608	142
who are members eligible to vote and hold office.....	609	142
may hold what amount of personal property.....	610	143
such, how disposed of.....	610	143
may issue bonds to pay for grounds.....	611	143
proceeds, how disposed of.....	611	143
may take and hold property or use income thereof, how.....	612	143
interments in lot and effect thereof.....	613	143
transfer of right only made, how.....	613	144
lot owners previous to purchase to be members.....	614	144
<b>CHAMBERS OF COMMERCE:</b>		
may be formed.....	286	61
<b>COMMERCIAL:</b>		
may be formed.....	286	61
<b>DOCK: See BRIDGE, etc.</b>		
<b>EDUCATIONAL:</b>		
may be formed.....	286	61
married women may become corporators, etc., of.....	285	60
<b>FERRY: See BRIDGE, FERRY, etc.</b>		
<b>GAS:</b>		
may be formed.....	286	61
to obtain privilege from city or town.....	628	145
to use what meters.....	628	145
to supply gas on written application.....	629	146
damages for refusal.....	629	146
when may refuse to supply.....	630	146
pipes of, how laid.....	631	146
agent of, may inspect meters.....	632	146
when persons neglect to pay, gas may be shut off.....	633	147
<b>HOMESTEAD:</b>		
may be formed.....	286	61
time of corporate existence.....	557	129
by-laws to specify, what.....	558	129
by-laws to be furnished to members on demand.....	558	129

# INDEX.

649

	Section.	Page.
<b>CORPORATIONS: (Continued.)</b>		
advertisement and sale of delinquent and forfeited shares.....	559	129
may borrow and loan funds, and for what time.....	560	130
minors and married women may hold stock.....	561	130
limitation of speculation in lands.....	562	131
forfeiture for speculation beyond certain extent.....	562	131
when its corporate existence terminates.....	563	131
payment of premiums.....	564	131
annual report.....	565	132
<b>HOTEL:</b>		
may be formed.....	286	61
<b>INSURANCE:</b>		
corporation may be formed for.....	286	61
articles of incorporation to be submitted to Insurance Commissioner.....	296	66
to comply with requirements of Title on Insurance Commissioner.....	413	94
subscription to capital stock.....	414	95
purchase and conveyance of real estate.....	415	95
policies, how issued and by whom signed.....	416	95
dividends, of what, and when declared.....	417	96
Directors liable for loss on, in certain cases.....	418	96
<b>Fire and Marine:</b>		
capital stock.....	423	96
payment of subscription.....	424	97
certificate of, of paid up capital stock to be filed.....	425	97
property which may be insured.....	426	98
funds may be invested, how.....	427	98
rate of risk.....	428	98
amounts to be reserved before making dividends.....	429	98
ib.....	430	99
<b>Mutual Life, Health and Accident:</b>		
capital stock.....	437	99
guarantee fund.....	437	99
of what guarantee fund shall consist.....	438	100
what it constitutes.....	439	100
deficiency in capital stock.....	439	100
declaration of fixed capital to be filed.....	440	101
guarantee notes and interest, how disposed of.....	441	101
insured to be entitled to vote.....	442	102
may invest in what securities.....	443	102
number of Directors may be altered, how.....	444	102
limitation to the holding of stock.....	445	103
premiums, how payable.....	446	103
to furnish Insurance Commissioner certain facts.....	447	103
no stamp required on contract of accident insurance.....	448	104
<b>LAND AND BUILDING:</b>		
may be formed.....	286	61
how organized.....	639	147
may borrow money.....	640	147
powers and object of.....	641	148
may insure the lives of members and debtors.....	642	148
may own what real estate.....	643	148
by-laws may provide, what.....	644	148
annual report.....	645	149
liability of shareholders for debts.....	646	149
consolidation and transfer of business.....	647	150
minors and married women may hold stock.....	648	150
<b>LAUNDRY:</b>		
may be formed.....	286	61
<b>LIBRARY:</b>		
may be formed.....	286	61

	Section.	Page.
<b>CORPORATIONS: (Continued.)</b>		
<b>LITERARY:</b>		
may be formed.....	286	61
married women may become corporators, etc., of.....	285	60
<b>MANUFACTURING:</b>		
may be formed.....	286	61
<b>MECHANICS' INSTITUTE:</b>		
may be formed.....	286	61
<b>MERCANTILE:</b>		
may be formed.....	286	61
<b>MINING:</b>		
may be formed.....	286	61
removal of principal office provided for.....	584	137
Directors to file certificate of what, where.....	585	137
transfer agencies.....	586	137
stock issued at transfer agencies.....	587	137
<b>PIER: See BRIDGE, FERRY, etc.</b>		
<b>PRINTING:</b>		
may be formed.....	286	61
<b>RAILROAD:</b>		
may be formed.....	286	61
articles of incorporation must state what, in addition.....	291	65
prerequisites to filing articles of incorporation.....	292	65
Directors to be elected, when.....	453	104
assessment of stock, how made and collected.....	454	104
additional provision in assessment and transfer of stock.....	455	105
may borrow money and issue bonds.....	456	105
to provide sinking fund to pay bonds.....	457	105
capital stock to be fixed.....	458	106
certificate of payment of fixed capital stock.....	459	106
enumeration of powers.....	465	107
map and profile to be filed.....	466	109
may change line of.....	467	109
forfeiture of franchise.....	468	109
crossings and intersections.....	469	109
condemnation.....	469	109
not to use public streets, etc., except.....	470	110
not to charge fare to and from points in a city.....	471	110
when crossing highways, etc., how acquires right of way.....	472	110
may consolidate.....	473	111
proceedings to consolidate.....	473	111
check to be affixed to all baggage.....	479	111
damage for refusing so to do.....	479	112
annual report to be verified.....	480	112
form of report.....	480	112
duties of.....	481	113
to pay damages for refusing transportation.....	482	113
to furnish accommodations for passengers.....	483	113
to post regulations.....	484	113
not responsible for injuries incurred by violating rules.....	484	113
to pay damages.....	485	114
not liable in certain cases.....	485	114
may recover damages, when.....	485	114
regulations of trains.....	486	114
penalty for violating such.....	486	114
conductor may eject passengers, when.....	487	115
officers to wear badge.....	488	115
rates of charges.....	489	115
passenger tickets, how issued, and to be good for six months.....	490	116
character of iron to be used.....	491	116
<b>Street:</b>		
may be formed.....	286	61
articles of incorporation to state what additional facts.....	291	65
prerequisites to filing articles of incorporation.....	292	65

	Section.	Page.
<b>CORPORATIONS: (Continued.)</b>		
authority to lay track, how obtained.....	497	117
restrictions as regards granting right of way.....	498	117
cities and towns may make rules to govern.....	499	118
penalty for overcharging.....	500	119
to provide and furnish passenger tickets.....	501	119
penalty.....	501	119
trial, proof and limitation.....	502	119
city or town to reserve certain rights.....	503	119
license to be paid.....	504	120
track for grading purposes.....	505	120
general provisions applicable.....	506	120
<b>RELIGIOUS, SOCIAL AND BENEVOLENT:</b>		
may be formed.....	286	61
married women may become corporators, etc., of.....	285	60
how formed.....	593	138
articles of incorporation to state additional facts.....	594	138
may hold what amount of property.....	595	139
Masons, Odd Fellows and Pioneers may hold, how much.....	596	139
annual report.....	597	139
when forfeits franchise and lands.....	598	139
may, by order of Court, sell or mortgage property.....	599	140
proceedings thereon.....	599	140
may prove error what, in by-laws.....	600	141
members admitted after incorporation.....	601	141
membership not transferable.....	602	141
<b>ROAD:</b>		
may be formed.....	286	61
articles of incorporation must state what additional facts.....	291	65
prerequisites to filing articles of incorporation.....	292	65
<b>SAVINGS AND LOAN:</b>		
may be formed.....	286	61
may loan money, on what terms.....	571	132
capital stock and rights and privileges thereof.....	572	133
dividends to be from surplus.....	573	133
to contract no liability except for deposits.....	573	133
property which may be owned by, and disposal of such.....	574	134
restrictions on purchasers.....	574	134
married women and minors may own stock in.....	575	135
may issue transferable certificates of deposit.....	576	135
special certificates.....	576	135
to provide reserve fund for payment of losses.....	577	135
prohibition on officer of, and what vacates his office.....	578	136
<b>SOCIAL: See RELIGIOUS, SOCIAL AND BENEVOLENT.</b>		
<b>STAGE:</b>		
may be formed.....	286	61
articles of incorporation must state what additional facts.....	291	65
prerequisites to filing articles of incorporation.....	292	65
<b>STOCK RAISING:</b>		
may be formed.....	286	61
<b>STREET RAILROADS: See RAILROADS.</b>		
<b>TELEGRAPH:</b>		
may be formed.....	286	61
articles of incorporation must state what additional facts.....	291	65
prerequisites to filing articles of incorporation.....	292	65
right of way along water, roads and highways.....	536	125
liability for injuring telegraph property.....	537	126
liability for malicious injury to property.....	538	126
conditions on which damages to sub-aqueous cable may be recovered.....	539	126
duty to send dispatch.....	540	126
may dispose of certain rights.....	541	127
rates of charges to be fixed and published.....	542	127
<b>THEATRE:</b>		
may be formed.....	286	61

	Section.	Page.
<b>CORPORATIONS: (Continued.)</b>		
<b>WAGON ROAD:</b>		
may be formed.....	286	61
articles of incorporation must state what additional facts.....	291	65
prerequisites to filing articles of incorporation.....	292	65
three Commissioners to act with surveyors.....	512	121
survey and map to be filed and approved by Supervisors.....	513	121
tolls, etc., to be collected.....	514	122
penalty for taking unlawful tolls.....	514	122
no toll to be charged on public highways.....	515	122
rates of toll to be posted over gate.....	516	122
toll-gatherer may detain person until toll paid.....	517	122
toll-gatherer not to detain person unnecessarily.....	518	122
penalty for avoiding tolls.....	519	123
penalty for trespass on property of.....	520	123
when capital is repaid, tolls to be reduced.....	521	123
may mortgage and hypothecate property.....	522	123
<b>WATER AND CANAL:</b>		
may be formed.....	286	61
articles of incorporation to state what additional facts.....	291	65
prerequisites to filing articles of incorporation.....	292	65
may obtain contract to supply city or town.....	548	127
duties of.....	549	127
rates to be fixed by Commissioners.....	549	127
right of way.....	550	128
to build and keep bridges in repair.....	551	128
<b>WHARF: See BRIDGE, FERRY, etc.</b>		
<b>CORPORATORS:</b>		
married women may be, in certain corporations.....	285	60
number and qualifications of.....	295	66
ib.....	285	60
<b>COSTS:</b>		
of transportation of personal property sold, to place of delivery.....	1755	342
depositor must indemnify depositary for certain.....	1833	353
borrower to bear certain.....	1892	360
hirer to bear certain.....	1956	368
voluntary depositary may deduct for certain.....	2078	384
trustee entitled to repayment for certain.....	2273	410
partner to be indemnified for certain.....	2412	428
insurer liable for certain.....	2707	467
ib.....	2743	473
indemnity against.....	2778	477
<b>CO-PARTNERS: See PARTNER; PARTNERSHIP.</b>		
<b>CO-SURETIES:</b>		
contribution between.....	2848	488
entitled to benefit of each other's securities.....	2849	488
See SURETY.		
<b>CO-TENANTS: See TENANT.</b>		
<b>COTERMINOUS OWNERS:</b>		
rights of, to lateral and subjacent support.....	832	181
rights of, to line trees.....	834	181
mutual obligations of.....	841	181
<b>CO-TRUSTEES:</b>		
how far responsible for each other's acts.....	2239	406
must act in unison.....	2268	409
See TRUSTEE.		

	Section.	Page.
<b>COUNTY :</b>		
property of, how acquired by corporations.....	372	87
in what, personal mortgage must be recorded.....	2963	505
mortgaged property in transit deemed located in what....	2968	506
in what, mortgage of common carrier's property must be recorded.....	2968	506
<b>COUNTY CLERK :</b> See <b>CLERK.</b>		
<b>COUNTY JUDGE :</b>		
proceedings before, for adoption of child.....	226	48
duty of, in such case.....	227	48
duty of, on examination of insane person.....	258	53
duty of, when execution issues against homestead.....	1242	254
homestead claimant may enforce, to perform his duties.....	1245	255
duty of, on homestead petition.....	1261	258
duty of, on return of appraisers.....	1263	258
bond of assignee for benefit of creditors to be approved by....	3467	589
may require assignee to account, when.....	3469	590
See <b>JUDGE ; DISTRICT JUDGE ; COURT.</b>		
<b>COUNTY RECORDER :</b> See <b>RECORDER.</b>		
<b>COURT :</b>		
rule of decision in.....	5	3
to whom must award custody of child of annulled marriage...	85	24
where divorce denied, may grant relief for wife.....	136	35
ib.....	137	35
may award custody of child.....	138	35
may allow wife alimony, when.....	139	35
may require security for alimony.....	140	35
shall resort to what property in providing for wife.....	141	35
when may withhold allowance.....	142	35
to make order for division of property on divorce.....	147	36
to determine legitimacy of child, when.....	146	36
may direct allowance for support of child.....	201	44
may award exclusive control of child to either parent, on proper showing.....	199	44
may award custody of child to wife, in case of separation.....	215	46
appointment of guardian by.....	243	50
ib.....	244	51
jurisdiction of, appointing guardian.....	246	51
to be guided by what rules, in appointing guardian.....	246	51
guardian under direction of.....	251	52
when to execute power.....	936	196
ib.....	937	196
to settle controversy between ship owners.....	964	201
attornment of tenant to stranger by judgment of, valid.....	1128	233
may provide for acknowledgment for record of instruments evidencing judgment title.....	1161	236
when trustor.....	2252	407
how, may allow satisfaction of trustee's adverse trust.....	2263	409
discretionary power of trustee controlled by.....	2269	409
may reduce rate of interest on bottomry, when.....	3022	515
ib.....	3039	516
<b>COVENANTS :</b>		
accompanying transfer, effect of.....	1083	222
none implied in any grant, except.....	1103	227
kinds of.....	1104	227
effect of accepting grant without.....	1115	230
liability on other than Code.....	1119	231
when, run with the land.....	1460	294
what, run with the land.....	1461	294

	Section.	Page.
<b>COVENANTS: (Continued.)</b>		
what, run with the land.....	1462	294
ib.....	1463	295
what, run with the land, when assigns are named.....	1464	295
who are bound by.....	1465	295
who are not bound by.....	1466	295
apportionment of.....	1467	295
for quiet possession implied in hiring of property.....	1927	364
ib.....	1955	368
authority to agent to sell and convey includes.....	2324	417
<b>CODE:</b>		
are personal.....	1116	231
construction of.....	1109	228
liability on other than.....	1119	231
damages for breach of.....	3307	559
<i>General:</i>		
what are.....	1106	227
form of grant with.....	1108	228
ib.....	1733	339
of ownership.....	1106	227
of ownership, defined.....	1112	229
of ownership, personal.....	1116	231
of ownership, damages for breach of.....	1118	231
ib.....	1116	231
against all encumbrances.....	1106	227
against all encumbrances, defined.....	1114	230
against all encumbrances, personal.....	1116	231
against all encumbrances, damages for breach of.....	1118	231
ib.....	3315	560
<i>Special:</i>		
what are.....	1105	227
form of grant with.....	1107	227
ib.....	1733	339
against prior grants by grantor.....	1105	227
against prior grants by the grantor, defined.....	1110	228
against prior grants by the grantor, personal.....	1116	231
against prior grants by the grantor, damages for breach of.....	1117	231
ib.....	3308	559
against encumbrances by grantor.....	1105	227
against encumbrances by grantor, defined.....	1111	229
against encumbrances by grantor, personal.....	1116	231
against encumbrances by grantor, damages for breach of.....	1118	231
ib.....	3315	560
<b>COMMON LAW:</b>		
liabilities on, depend on what.....	1119	231
what, required by executory contract of sale.....	1734	339
run with the land.....	1463	295
damages for breach of.....	3306	558
<b>ERRATION:</b>		
of interest, time of.....	749	167
of remainders, future and contingent, of estates.....	773	173
of powers.....	890	189
of lien.....	2881	492
of real mortgage.....	2937	560
of contract.....	2303	321
of agency.....	2251	416
of trust.....	2251	407
<b>CREDIT:</b>		
sales on, by factor.....	2028	373
to agent exonerates principal, when.....	2336	418
agent accepting personal, liable as principal.....	2343	419
auctioneer not to give, except when usual.....	2362	421



	Section.	Page.
<b>CREDIT: (Continued.)</b>		
factor may give, except when unusual.....	2368	422
of shipowner, master may borrow on.....	2374	423
ship's manager cannot borrow on.....	2389	425
See CREDITOR.		
<b>CREDITOR:</b>		
defined .....	3430	581
trusts resulting in favor of.....	854	183
trusts for benefit of, may be created.....	857	184
trust fund, how far liable to.....	859	184
trust, when absolute in favor of subsequent.....	869	186
power, when a lien against.....	893	190
power creates a fee in favor of.....	919	194
power reserved, continues ownership in favor of.....	923	194
power, special and beneficial, liable to. ....	930	195
gift in view of death to be treated as legacy, as regards.....	1153	235
appraisal of homestead on affidavit of judgment.....	1242	254
when to pay expenses of appraisal of homestead.....	1244	255
competent witness to will.....	1279	262
acceptance by, necessary to satisfaction.....	1473	296
performance of obligation to one of several joint, sufficient....	1475	296
performance in manner directed by, sufficient.....	1476	296
application of performance by.....	1479	297
offer of performance must be made to.....	1488	299
offer of performance may be made at place appointed by.....	1489	299
offer of performance must be made so as to benefit.....	1493	300
must give receipt on payment.....	1499	301
must state objections to offer.....	1501	301
title to thing offered passes to, when.....	1502	301
obligation of, as to thing offered.....	1505	302
performance excused if prevented by.....	1511	302
effect of prevention, etc., of performance by.....	1512	303
ib.....	1513	303
effect of refusal by, to accept performance.....	1515	303
acceptance of accord by, is satisfaction.....	1523	304
acceptance of part performance, when satisfaction.....	1524	304
novation may be made by substituting a new for an old, how..	1531	305
may rescind novation, when.....	1536	306
release by, how made.....	1541	307
release by, effect of.....	1542	307
when sale of personal property void against.....	1759	843
partner cannot make assignment of partnership property, in		
trust for benefit of.....	2430	430
liability of partner after dissolution to.....	2453	433
of special partnership, special partner may be.....	2491	438
special partner postponed to every other.....	2491	438
special partner, when liable as general partner to.....	2502	440
preference given to, in insolvency, void.....	2496	439
guarantor liable to, when.....	2807	483
guarantor exonerated by certain dealings between debtor and	2819	484
guarantor partially exonerated by partial payment to.....	2822	485
guarantor not exonerated by voidable promise of.....	2820	484
guarantor not exonerated by mere delay of.....	2823	485
guarantor not exonerated by discharge of debtor without act		
of.....	2825	485
guarantor with indemnity, when not exonerated.....	2824	485
surety liable only as such, notwithstanding recovery of judg-		
ment by.....	2838	487
surety exonerated by injurious act or omission of.....	2840	487
surety exonerated by refusal of creditor to sue, when.....	2845	488
surety may enforce remedies of, when.....	2845	488
surety entitled to securities held by, when.....	2849	488
entitled to benefit of surety's securities.....	2854	489

	Section.	Page.
<b>CREDITOR: (Continued.)</b>		
lien void against, when.....	2913	496
mortgage of personal property not filed void against.....	2973	507
mortgage, when ceases to be valid against.....	2971	507
of mortgageor, remedy of.....	2976	508
of mortgagee, remedy of.....	2977	508
contracts of debtor valid against, when.....	3431	581
debtor may prefer, when....	2432	581
ib. ....	3453	586
must resort to different funds, in what order.....	2899	494
certain transfers, etc., of debtor void against.....	3439	582
ib. ....	3440	583
can avoid act of debtor, when.....	3442	583
transfer without value, not necessarily void against.....	3443	583
assignment for benefit of.....	3449	584
assignment void against, when.....	3457	587
right of, to priority, not impaired by assignment.....	3455	586
may require assignee to account .....	3469	590
See ASSIGNMENT; DEBTOR; ENCUMBRANCER.		
<b>CROPS:</b>		
right of tenant for years or at will to harvest.....	819	179
growing, not to be injured by miners.....	1409	285
after harvesting, miners may work.....	1412	286
growing, subject of mortgage.....	2958	584
<b>CRUELTY:</b>		
extreme, ground for divorce.....	92	25
defined .....	94	25
in case husband or wife leave on account of, who commits		
desertion.....	98	26
disposition of common property in divorces granted for.....	148	37
ground for annulling indenture of apprenticeship.....	276	56
<b>CURRENT MONEY:</b>		
borrower under loan of money must repay in.....	1913	362
<b>CURTESY:</b>		
estate by, abolished.....	179	41
<b>CUSTODY:</b>		
of minors.....	25	8
of persons of unsound mind.....	25	8
of legitimate child.....	197	43
of illegitimate child.....	200	44
of child, parent may relinquish.....	211	45
of minors, when wife may obtain.....	215	46
parents living separate, neither have superior right to, of child	198	43
of children of annulled marriage.....	84	24
of children of divorced marriage.....	138	35
<b>CUSTOMARY:</b>		
defined.....	3578	606
		•
<b>D</b>		
<b>DAMAGES:</b>		
defined .....	3281	554
railroad corporations liable for certain.....	485	114
when owner of ship cannot sue for, for injuries arising from		
collision .....	971	203
willful trespasser liable for.....	1033	215
contract fixing, void.....	1670	328
may be liquidated, when.....	1671	328

	Section.	Page.
<b>DAMAGES: (Continued.)</b>		
when depositor must indemnify depositary for certain.....	1833	353
liability of depositary for certain.....	1836	353
liability of finder of lost property for.....	1865	357
liability of lender to borrower for certain.....	1893	360
indemnity against.....	2778	477
allowed for refusing to acknowledge satisfaction of mortgage.	2951	503
allowed on dishonor of foreign bill.....	3234	546
ib.....	3237	547
defined.....	3281	554
may cover future loss, when.....	3283	554
interest by way of.....	3287	555
interest, damages bear, when.....	3287	555
interest allowed for breach of obligation other than contract..	3288	555
interest allowed for fraud, malice, etc.....	3288	555
interest agreed upon governs rate of.....	3289	555
interest, acceptance of, waives principal.....	3290	555
exemplary, when allowed.....	3294	556
exemplary, not allowed, against minor, lunatic, etc.....	36	10
for breach of contract.....	3300	557
must be clearly ascertainable.....	3303	558
for payment of money.....	3304	558
for breach of covenant of "seisin".....	3306	558
for breach of covenant of "warranty".....	3306	558
for breach of covenant of "right to convey".....	3306	558
for breach of covenant of "quiet enjoyment".....	3306	558
for breach of covenant "against encumbrances".....	3306	558
for breach of covenant "against prior grants by the grantor," and of "ownership".....	3308	559
for breach of agreement to convey real property.....	3316	560
for breach of agreement to purchase real property.....	3317	561
for breach of agreement to sell personal property.....	3318	561
ib.....	3319	561
for breach of agreement to buy personal property.....	3321	561
for breach of agreement to pay for personal property.....	3320	561
for breach of warranty of title to personal property.....	3322	562
for breach of warranty of quality of personal property.....	3323	562
for breach of carrier's obligation to accept freight, etc.....	3325	563
for breach of carrier's obligation to deliver freight, etc.....	3326	563
for breach of carrier's obligation to deliver messages..	2209	401
for breach of warranty of agent's authority.....	3328	563
for breach of promise of marriage.....	3329	564
for wrongs in general.....	3333	564
for wrongful occupation of real property.....	3334	564
for holding over real property.....	3335	564
for conversion of personal property.....	3336	565
for conversion in favor of lienor.....	3338	565
for seduction.....	3339	565
for injuries to animals.....	3340	565
for tenant's failure to quit after notice.....	3344	566
for tenant holding over.....	3345	566
for forcible dispossession.....	3346	566
for injuries to trees, etc.....	3347	566
for injuries inflicted in duel.....	3348	566
ib.....	3349	566
value of property, how estimated in assessing in favor of seller	3353	567
value of property, how estimated in assessing in favor of buyer	3354	567
value of property, peculiar, when allowed as.....	3355	567
value of thing in action, how estimated in assessing.....	3356	568
to be reasonable.....	3358	568
nominal.....	3360	569
for delay, must be paid on redemption from lien.....	2905	495

	Section.	Page.
<b>DAMAGES: (Continued.)</b>		
difficulty of ascertaining, ground for specific relief.....	3380	571
ib.....	3384	572
inadequacy of, ground for specific relief.....	3380	571
ib.....	3384	572
<b>DATE:</b>		
grant presumed to be delivered at its.....	1055	218
of negotiable instrument need not be stated.....	3091	524
<b>DAUGHTER:</b>		
protection from seduction of.....	48	13
<b>DAYS OF GRACE:</b>		
not allowed.....	3181	539
<b>DEATH:</b>		
of minor, personal representatives may disaffirm contracts on.....	29	9
dissolves marriage.....	90	24
of joint guardian, effect of.....	252	52
of joint grantee of power.....	900	191
of trustee of power, effect of.....	936	196
without heirs, etc., defined.....	1075	221
gift in view of, defined.....	1149	235
gift, when presumed to be in view of.....	1150	235
gift in view of, revocation of.....	1151	235
gift in view of, effect of will upon.....	1152	235
gift in view of, when treated as a legacy.....	1153	235
of devisee or legatee before testator, effect of, on testamentary disposition.....	1309	268
ib.....	1343	272
of devisee before testator does not affect interests in remainder distribution of common property on, of wife.....	1344	273
distribution of common property on, of husband.....	1396	283
of heir advanced to, before that of deviser.....	1397	283
in case of, of seaman, who entitled to his wages.....	1394	283
of maker of instrument bearing nominal date, does not invalidate it.....	2062	383
notice of dishonor given in ignorance of, of indorser, valid.....	3099	525
	3147	534
<b>DEBT:</b>		
corporations not to create, beyond actual subscribed stock.....	327	76
ib.....	315	72
when officer of corporation becomes liable for.....	316	72
ib.....	327	76
liability of stockholder for, of corporation.....	322	74
ib.....	357	83
earnings of wife not liable for, of husband.....	174	40
husband not liable for ante-nuptial, of wife.....	176	40
separate property of wife not liable for, of husband.....	177	40
separate property of wife liable for her own.....	177	40
included in word "encumbrances".....	1114	230
homestead liable for certain.....	1239	253
property of intestate, how disposed of in payment of.....	1358	275
property of testator, how disposed of in payment of.....	1359	275
legacies, how charged with.....	1360	275
ib.....	1361	276
liability of beneficiaries for testator's.....	1378	278
how extinguished by offer of payment.....	1500	301
accord of liquidated.....	1524	304
agreement to answer for, of another.....	1624	321
partner may require partnership property to be applied to payment of.....	2405	427
partner acting in liquidation may collect, compromise, etc.....	2461	434
liability of contribution of special partner for.....	2501	439

# INDEX.

659

	Section.	Page.
<b>DEBT : (Continued.)</b>		
special partner not personally liable for partnership, when.....	2501	439
when Court may decree payment of, before maturity.....	2976	508
pledgee cannot sell certain pledged evidences of .....	3006	512
<b>DEBTOR :</b>		
defined.....	3429	581
insolvent, absconding, etc., beneficial trust for passes to as- signees .....	895	190
performance must be made by or for.....	1473	296
performance by one of several joint.....	1474	296
effect of directions to, as to performance, by creditors.....	1476	296
application of general performance by.....	1479	297
offer of performance must be made by or for.....	1487	299
rights of, upon prevention of performance .....	1512	303
ib.....	1513	303
ib.....	1514	303
may require receipt, upon payment.....	1499	301
novation may be made by substituting a new for an old one, how.....	1531	305
release of, by creditor, how made.....	1541	307
release of, by creditor, effect of.....	1542	307
joint, release of several.....	1543	307
fraudulent misrepresentation of, as to value of pledge, effect of may pay or secure one creditor in preference to another.....	2999	511
certain transfers, etc., of, void against creditors.....	3432	581
when creditor can avoid act of.....	3431	582
insolvent, may assign for benefit of creditors, when.....	3442	583
insolvent, defined.....	3449	585
insolvent, what preferences may be given by.....	3450	585
insolvent, what preferences may be given by.....	3453	586
See ASSIGNMENT.		
<b>DECEDENT :</b>		
successors of, may dispute legitimacy of issue.....	195	43
liability of person acquiring property of.....	1127	232
See INTTESTATE ; TESTATOR.		
<b>DECEIT :</b>		
renders contract voidable.....	1567	311
an essential element of fraud.....	1572	312
when actionable.....	1709	335
ib.....	1710	335
upon the public.....	1711	335
See CONCEALMENT ; MISREPRESENTATION ; FRAUD.		
<b>DECK :</b>		
freight not to be stowed on.....	2117	388
things stowed on, when entitled to benefit of general average	2154	394
<b>DECLARATION :</b>		
of marriage, how made.....	75	21
of trust, effect of omitting in grant.....	869	186
of trust, act in contravention to, void.....	870	186
of trust, defined .....	2253	407
of trust, trustee must obey .....	2288	408
homestead, what to contain.....	1252	256
homestead, how executed, acknowledged and recorded.....	1254	257
<b>DEED :</b>		
ownership of title.....	994	209
included in term "grant" .....	1053	218
<b>DEFAMATION :</b>		
right of protection from.....	43	11
how effected.....	44	11

	Section.	Page.
<b>DEFAULT:</b>		
divorces not to be granted by.....	132	34
presumption of wilful, in case of certain collision of vessels..	922	203
agreement to answer for, of another must be in writing.....	1624	331
See NEGLIGENCE.		
<b>DEFEAT:</b>		
of future interests, what operates as.....	739	166
ib.....	740	166
what does not operate as.....	741	166
ib.....	742	166
<b>DEFECT:</b>		
in execution of power, remedies of purchaser .....	915	183
in certificate of acknowledgment of instrument, action to rec-		
tify lies.....	1192	245
implied warrant of manufacturer against latent.....	1769	345
depositor must indemnify depository for damages arising out		
of, of deposit.....	1833	353
lender must indemnify borrower for damages arising out of,		
of thing lent.....	1893	360
in notice of loss under insurance, how waived.....	2635	459
<b>DEFINITIONS:</b>		
Abandonment.....	2716	468
Acceptance of offer .....	1584	316
Acceptance of bill .....	3193	540
Accord.....	1521	304
Adult.....	19	7
Adultery.....	93	25
Advancement.....	1392	282
Agency.....	2295	413
actual.....	2299	413
ostensible.....	2300	413
Agent.....	2295	413
special.....	2297	413
general.....	2297	413
Agreement for sale.....	1726	338
to sell.....	1727	338
to buy.....	1728	338
to sell and buy.....	1729	339
Annuity.....	1357	274
Appurtenances.....	661	150
Articles of incorporation .....	289	64
Auction.....	1792	342
Authority, actual.....	2316	415
ostensible.....	2317	416
Author of power.....	880	188
Average, general.....	2148	393
Bail.....	2780	478
Beneficiary.....	2218	402
Bill of exchange.....	3171	537
inland.....	3224	544
foreign.....	3224	544
Bill of lading.....	2126	390
Bottomry .....	3017	514
Business days.....	3575	605
Care, slight.....	3558	603
ordinary.....	3558	603
great.....	3558	603
Carrier, marine.....	2087	383
inland.....	2087	385
common.....	2168	395
Charter party.....	1959	368

	Section.	Page.
<b>DEFINITIONS: (Continued.)</b>		
Chattel real.....	765	171
interest.....	765	171
Check.....	3254	548
Children.....	3561	604
Confusion.....	115	29
Common carrier.....	2168	395
Common law.....	5	2
Community property.....	687	160
Concealment.....	2561	449
Condition precedent.....	1346	273
subsequent.....	1348	273
concurrent.....	1437	291
Conditional devise or legacy.....	1345	273
obligation.....	1434	291
Condonation.....	116	29
Connivance.....	43	29
Consent to marriage.....	57	17
Consideration, good.....	1606	318
Consignee.....	2110	387
Consignor.....	2110	387
Constitution.....	4	2
Contract.....	1549	309
express.....	1620	321
implied.....	1621	321
Corporation.....	283	60
public.....	284	60
private.....	284	60
articles of incorporation.....	289	61
Covenants, Special Code.....	1105	227
against prior grants.....	1110	228
against encumbrances.....	1111	229
Covenants, General Code.....	1106	227
of ownership.....	1112	229
against all encumbrances.....	1113	230
Creditor.....	3430	581
ib.....	3563	604
Cruelty, extreme.....	94	25
Customary.....	3578	606
Damages.....	3281	554
Debtor.....	3562	604
ib.....	3429	581
Deceit.....	1710	335
Declaration of trust.....	2253	407
Deposit.....	1813	350
voluntary.....	1814	350
involuntary.....	1815	350
for keeping.....	1817	351
for exchange.....	1818	351
gratuitous.....	1844	354
for hire.....	1851	355
Depository.....	1814	350
Depositor.....	1814	350
Desertion.....	95	25
Detriment.....	3282	554
Deviation.....	2694	465
Diligence.....	3558	603
ordinary.....	3558	603
great.....	3558	603
Dishonor.....	3141	533
Divorce.....	91	24
Dominant tenement.....	803	177
Drawee.....	3171	537
Drawer.....	3171	537

	Section.	Page.
<b>DEFINITIONS: (Continued.)</b>		
Duress.....	1569	312
Easements.....	891	176
Easterly.....	1074	221
Employé.....	1965	360
Employer.....	1965	360
Employment.....	1965	360
Encumbrances.....	1114	230
Escrow.....	1059	219
Estates in real property.....	699	161
in fee.....	762	170
of freehold.....	765	171
Exchange.....	1804	349
Factor.....	2026	378
ib.....	2367	422
Felony.....	108	28
Fixtures.....	660	156
Fraud, actual.....	1572	312
constructive.....	1573	313
Freeholds.....	765	171
Freight.....	2110	387
Freightage.....	2110	387
Gift.....	1146	234
in view of death.....	1149	235
Good faith.....	3563	604
Good will.....	992	209
Grant.....	1052	218
Guaranty.....	2787	476
continuing.....	2814	484
Guardian.....	236	50
Head of the family.....	1253	256
Habitual intemperance.....	107	28
Hiring.....	1925	362
Holder of power.....	880	188
Holidays.....	3573	605
Homestead.....	1237	253
Impossibility.....	1597	317
Income.....	748	167
Indemnity.....	2772	476
Indorsee in due course.....	3124	629
Indorsement.....	3108	627
general.....	3112	627
special.....	3113	627
Indorser.....	3108	627
Innkeeper.....	3053	519
Insolvency.....	3450	585
Insurable interest.....	2546	446
Insurance.....	2527	446
double.....	2641	459
marine.....	2655	461
Insured.....	2538	446
Insurer.....	2538	446
Intemperance, habitual.....	107	28
Interest of money.....	1915	362
compound.....	3585	607
Interests, joint.....	683	160
partnership.....	684	160
in common.....	685	160
present.....	689	160
future.....	690	160
perpetual.....	691	161
limited.....	692	161
vested.....	694	161
contingent.....	695	161



# INDEX.

663

	Section.	Page.
<b>DEFINITIONS: (Continued.)</b>		
Interpretation .....	1066	220
Jettison.....	2148	393
Land.....	659	156
Law.....	3	2
Legacy, specific.....	1357	274
demonstrative.....	1357	274
residuary.....	1357	274
general.....	1357	274
Letter of credit.....	2858	489
general.....	2861	489
special.....	2861	489
Libel.....	45	10
Lien.....	2872	491
general.....	2874	492
special.....	2875	492
Loan for use.....	1884	359
for exchange.....	1902	361
of money.....	1912	362
Loss, total.....	2703	467
partial.....	2702	466
actual total.....	2704	467
constructive total.....	2705	467
Luggage.....	2182	397
Manager of ship.....	2070	384
Managing owner.....	2070	384
Marriage.....	55	16
Master.....	2009	376
Mate.....	2048	381
Maturity, apparent.....	2132	531
Menace.....	1570	312
Minor.....	17	7
Mistake.....	1576	314
of fact.....	1577	314
of law.....	1578	315
of foreign law.....	1579	315
Month.....	3581	607
Mortgage.....	2919	497
real.....	2936	499
personal.....	2956	504
Mutual consent.....	1580	315
Navigation, foreign.....	962	201
domestic.....	962	201
Neglect, wilful.....	106	27
Negligence, slight.....	3560	603
ordinary.....	3560	603
gross.....	3560	603
Negotiable instrument.....	3087	524
Northerly.....	1074	221
Notice, actual.....	3565	604
constructive.....	3566	604
Novation.....	1530	305
Nuisance.....	3479	591
public.....	3480	592
private.....	3481	592
Oath.....	3585	607
Object of contract.....	1595	317
Obligation.....	1418	289
conditional.....	1434	291
Ownership.....	654	155
absolute.....	679	159
qualified.....	680	159
several.....	681	159
joint.....	683	159

	Section.	Page.
<b>DEFINITIONS: (Continued.)</b>		
partnership.....	684	160
in common.....	685	160
Paper.....	3589	605
Partnership.....	2395	428
general.....	2424	428
special.....	2479	436
Partnership property.....	2401	428
Payment.....	1473	297
Perils of the sea.....	2199	399
Person.....	3570	605
Person of unsound mind.....	24	8
Personal property.....	663	157
Pledge.....	2986	509
Pledgeholder.....	2993	510
Policy of insurance.....	2686	452
open.....	2695	454
valued.....	2596	454
running.....	2597	454
Possibility.....	1597	317
Power.....	879	188
general.....	882	188
special.....	883	188
beneficial.....	884	189
in trust.....	885	189
in trust, general.....	886	189
in trust, special.....	887	189
Preventive relief.....	3368	579
Principal.....	2295	413
Price.....	1721	338
Privileged communication.....	47	13
Privileged publication.....	47	13
Promissory note.....	3244	547
Property.....	654	155
Purchaser for value.....	1200	246
Real instruments.....	1092	223
Real property.....	658	156
Reconciliation.....	122	31
Reinsurance.....	2646	460
Remainder.....	769	171
Respondentia.....	3036	516
Reversion.....	768	171
Sale.....	1721	338
Sale by auction.....	1792	342
Satisfaction.....	1523	304
Seal.....	3589	605
Seamen.....	2049	351
Seaworthiness.....	2682	464
Servant.....	2009	376
Servient tenement.....	803	177
Servitudes.....	802	176
Several.....	3571	605
Ship's manager.....	2070	384
Ship.....	960	200
appurtenances of.....	961	200
domestic.....	963	201
foreign.....	963	201
Signature.....	3586	607
Slander.....	46	13
Southerly.....	1074	201
Specific relief.....	3367	509
Statutes.....	4	3
Storage.....	1851	355
Succession.....	1384	276

# INDEX.

665

	Section.	Page.
<b>DEFINITIONS: (Continued.)</b>		
Surety .....	2831	485
Thing in action .....	953	200
Third person .....	3572	605
Trade mark .....	991	209
Transfer .....	1039	216
Trust .....	2215	402
voluntary .....	2216	402
involuntary .....	2217	402
Trustee .....	2218	402
Truster .....	2218	402
Undue influence .....	1575	313
Unlawful .....	1667	328
Usage .....	3577	606
Usual .....	3578	606
Value .....	3579	606
Verdict .....	3580	606
Ward .....	237	50
Warranty .....	1763	344
Westerly .....	1074	221
Writing .....	3587	607
Year .....	3581	607
<b>DELAY:</b>		
showing reasonable grounds for, rebuts presumption arising		
from lapse of time .....	126	82
on part of creditor does not discharge guarantor .....	2825	485
in performance may be compensated for, when .....	1492	299
how excused .....	1511	302
carrier of persons must travel without unreasonable .....	2104	387
notice of loss under insurance to be given without .....	2633	458
in giving notice of loss, how waived .....	2626	459
deemed deviation, when .....	2694	465
in presentment or notice of dishonor of negotiable instrument,		
how excused .....	3158	536
in presentment of bill of exchange, effect of .....	3189	540
in presentment of bill of exchange, how excused .....	3219	544
in presentment of promissory note, effect of .....	3248	548
in presentment of check, effect of .....	3255	548
in protest, how excused .....	3230	545
<b>DELIVERY:</b>		
deemed the time of creation .....	749	167
penalty for non, by tenant at specified time .....	791	175
of grant necessary to vest title .....	1054	218
presumption of time of .....	1055	218
conditional, to grantee, forbidden .....	1056	218
to grantee, necessarily absolute .....	1056	218
in escrow .....	1059	219
constructive .....	1061	219
of gift necessary to its validity .....	1147	235
of contract in writing, provisions applicable to .....	1626	322
of goods sold, when to be made .....	1753	342
of goods sold, where to made .....	1754	342
of goods sold, expense of, by whom borne .....	1755	342
of goods sold, notice of election as to mode of .....	1756	343
of goods sold, buyer's directions to be followed .....	1757	343
of goods sold, when to be made .....	1758	343
of personal property, to be made immediately, when .....	1759	343
thing bought, to be paid for on .....	1784	347
of thing deposited, must be made on demand .....	1822	351
of thing deposited, demand necessary .....	1823	351

	Section.	Page.
<b>DELIVERY : (Continued.)</b>		
of thing deposited, must be made, where.....	1824	352
of thing deposited, by joint owners.....	1827	352
of freight, to whom made.....	2118	389
of freight, where made.....	2119	389
of freight, to holder of bill of lading sufficient.....	2131	391
essential in pledge.....	2988	510
essential to validity of personal mortgage, when.....	2973	507
<b>DEMAND :</b>		
when restoration of thing wrongfully taken to be upon.....	1713	336
goods sold to be delivered upon.....	1753	342
thing deposited must be delivered on.....	1822	351
thing deposited need not be delivered without.....	1823	351
thing lent must be returned without, when.....	1895	360
thing lent need not be returned unless on, when.....	1895	360
employé must render account without.....	1926	372
employé, when not bound to deliver without.....	1987	372
servant to deliver over without.....	2014	376
agent to deliver to third person on, when.....	2344	429
upon guarantor, unnecessary.....	2807	483
of performance on pledgeor must be made before sale of pledge	3001	511
of performance, how waived.....	3004	512
of payment of negotiable instrument, when necessary.....	3130	530
<b>DEPOSIT :</b>		
Judge may order, of certain amount of proceeds of home-		
stead sale.....	1243	254
of money offered in payment of debt, how made.....	1500	301
kinds of.....	1813	350
voluntary.....	1814	350
involuntary.....	1815	350
involuntary, is gratuitous.....	1845	354
<b>For EXCHANGE :</b>		
relations of parties to.....	1878	358
<b>For KEEPING :</b>		
defined.....	1817	351
gratuitous.....	1844	354
gratuitous, involuntary is.....	1845	354
gratuitous, obligations of depositary on.....	1846	354
gratuitous, duties of depositary on, when cease.....	1847	354
for reward, called storage.....	1851	355
for reward, degree of care required on.....	1852	355
for reward, rate of compensation on.....	1853	355
for reward, how terminated.....	1854	355
ib.....	1855	355
with innkeeper.....	1859	356
ib.....	1860	356
of thing found.....	1864	356
of thing pledged, by gratuitous pledge holder.....	2995	511
<b>DEPOSITARY :</b>		
has insurable interest.....	2548	447
when person offering thing in performance is.....	1603	302
when seller of personal property must act as.....	1748	342
defined.....	1814	350
who bound to become.....	1815	350
duties of, in case of involuntary deposit.....	1816	351
must deliver on demand.....	1822	351
not bound to deliver without demand.....	1823	351
must deliver, where.....	1824	352
must give notice to depositor of adverse claim.....	1825	352
may exonerate himself from liability to third person by giving		
notice.....	1826	352

# INDEX.

667

	Section.	Page.
<b>DEPOSITARY: (Continued.)</b>		
must deliver to joint owners in shares.....	1827	352
depositor must indemnify, when.....	1833	353
of animals, must provide suitably for them... .	1834	353
must not use deposit.....	1835	353
liability of, for wrongful use of deposit.....	1836	353
may sell deposit, when.....	1837	353
must give information of cause of loss.....	1838	354
duties and liabilities of, in respect to service.....	1839	354
liability of, for negligence, how limited.....	1840	354
gratuitous, must use slight care.....	1846	354
gratuitous, duties of, when cease.....	1847	354
gratuitous, when creditor is.....	1505	302
for hire, defined.....	1851	355
for hire, must use ordinary care.....	1852	355
for hire, rights of.....	1853	355
for hire, duties of, how terminated.....	1854	355
ib.....	1855	355
for hire, finder of lost property is.....	1864	356
innkeeper as, liability of.....	1859	356
for exchange.....	1878	358
voluntary, obligations of.....	2078	384
when pledgee assumes liability of, for reward.....	2998	511
See INNKEEPER.		
<b>DEPOSITOR:</b>		
defined.....	1814	350
must indemnify depositary, for what.....	1826	352
entitled to certain notices from depositary.....	1825	352
ib.....	1838	354
must indemnify depositary, when.....	1833	353
may terminate deposit at any time.....	1854	355
ib.....	1855	355
for exchange.....	1878	358
<b>DEPUTY:</b>		
may take acknowledgments in name of principal.....	1173	239
<b>DESCENT: See SUCCESSION.</b>		
<b>DESCRIPTION:</b>		
of thing granted.....	1073	221
of land, construction of words used in.....	1074	221
agreement to compensate for errors of, when does not pre- judice right of rescission.....	1090	331
<b>DESERTION:</b>		
ground for divorce.....	92	25
defined.....	95	25
how manifested.....	96	26
in case of stratagem or fraud, who commits.....	97	26
in case of cruelty, who commits.....	98	26
separation by consent not.....	99	26
intent to commit, not to be inferred.....	100	26
separation and intent must co-exist.....	101	27
how cured.....	103	27
if wife refuses to accept husband's reasonable place of resi- dence she commits.....	104	27
if place is unfit, and she refuses, husband commits.....	105	27
refusal of reconciliation after separation is.....	102	27
refusal of condonation is.....	103	27
from ship, by seaman, forfeits his wages.....	2063	383
See DIVORCE.		

	Section.	Page.
<b>DESTRUCTION :</b>		
of written will operates as revocation, when.....	1291	264
of written will, proof of, how made.....	1292	265
of written contract, effect of.....	1699	332
ib.....	1700	333
See ALTERATION ; CANCELLATION.		
<b>DETENTION :</b>		
of person or property avoids contract, when.....	1569	312
of property, damages for.....	3335	564
See CONFINEMENT ; DURESS.		
<b>DETRIMENT :</b> See DAMAGES.		
<b>DEVIATION :</b>		
in marine insurance, defined.....	2694	465
in marine insurance, when proper.....	2695	466
in marine insurance, when improper.....	2696	466
in marine insurance, improper, discharges insurer.....	2697	466
carrier must not make.....	2104	387
<b>DEVISE :</b>		
power to dispose of property by, how executed.....	901	191
effect of power to, in certain cases.....	921	194
of land by will, how construed.....	1310	268
what may pass by .....	1274	261
who may take by.....	1275	261
subject to lien, when.....	1301	266
takes partial effect only, when.....	1302	266
when revoked by transfer, etc.....	1303	267
when does not lapse by death of devisee.....	1309	269
to subscribing witness void.....	1281	263
clear, cannot be controlled by words less clear.....	1322	270
embraces property under power, when.....	1330	271
of all testator's real property, effect of.....	1331	271
of residue of estate, effect of.....	1332	271
to heirs, relatives, etc., effect of.....	1334	271
to a class, includes whom.....	1337	272
vests, when .....	1341	272
how divested.....	1342	272
conditional, defined.....	1345	273
conditional, vests when.....	1347	273
to several persons, effect of.....	1350	273
when not to impair rights of purchaser.....	1364	276
title passes by specific.....	1363	276
See BEQUEST ; LEGACY ; WILL.		
<b>DEVISEE :</b>		
may dispute legitimacy of issue.....	195	43
devise, when does not lapse by death of.....	1309	269
devise, when lapses by death of.....	1343	272
interest in remainder not affected by death of.....	1344	273
when several take as tenants in common.....	1350	273
<b>DILIGENCE :</b>		
degrees of.....	3557	603
<b>SLIGHT :</b>		
defined .....	3558	603
gratuitous employé must use.....	1975	370
gratuitous carrier of property must use.....	2114	388
<b>ORDINARY :</b>		
defined .....	3558	603
agent must use .....	2020	877
voluntary agent must use.....	2078	384

# INDEX.

669

	Section.	Page.
<b>DILIGENCE: (Continued.)</b>		
gratuitous carrier of persons must use.....	2096	386
carrier of property for reward must use.....	2114	388
trustee must use .....	2259	408
<b>GREAT:</b>		
defined .....	3558	603
employé for his own benefit must use.....	1979	371
shipmaster must use.....	2043	380
carrier of messages for reward must use.....	2162	394
<b>UTMOST:</b>		
carrier of persons for reward must use .....	2100	386
carrier of messages by telegraph must use.....	2162	394
<b>DIRECTIONS:</b>		
of author of power, when to be disregarded.....	903	191
ib.....	904	191
ib.....	905	192
of author of power, when to be observed .....	906	192
of buyer, to be followed as to delivery of goods bought.....	1757	343
of employer, employé to follow.....	1981	371
of principal, factor to follow.....	2030	379
carrier must follow whose.....	2115	388
ib.....	2116	388
of trustor, trustee must follow.....	2258	408
<b>DIRECTORS: See CORPORATIONS.</b>		
<b>DISAFFIRMANCE:</b>		
minor may contract, subject to his power of.....	28	9
when minor may exercise power of.....	29	9
when minor and insane person cannot exercise power of.....	30	9
ib.....	81	9
See RESCISSION.		
<b>DISCHARGE:</b>		
of servant.....	2015	377
of employé.....	1996	374
ib.....	2000	375
of trustee.....	2233	405
ib.....	2282	411
of trustee, duties of, before accepting his.....	2260	408
of trustee, who succeeds after.....	2287	411
ib.....	2288	411
ib.....	2289	412
of principal does not discharge guarantor, when .....	2825	485
<b>DISHONOR:</b>		
of negotiable instrument, defined.....	3141	533
of bill of exchange by refusal to accept.....	3185	539
of bill of exchange does not take place till presented to drawee in case of need.....	3188	540
of bill of exchange by refusal of unqualified acceptance..	3194	541
of bill of exchange, when presumed.....	3133	531
of bill of exchange, acceptance for honor may be made after..	3207	543
in case of, agent to charge parties.....	2021	377
rights of indorsee of check, without notice of.....	3255	548
notice of, to be given to indorser.....	3116	527
notice of, by whom to be given.....	3142	533
notice of, form of.....	3143	533
notice of, how to be served.....	3144	533
notice of, how served after death of indorser.....	3145	533
notice of, at what time to be given .....	3147	534
notice of, when to be mailed.....	3148	534
notice of, by agent, need only be given to principal.....	3149	534

	Section.	Page.
<b>DISHONOR: (Continued.)</b>		
notice of, by party charged with notice, time allowed for.....	3150	534
notice of, inures to benefit of other parties.....	3151	534
notice of, when excused.....	3155	535
ib.....	3156	535
ib.....	3157	535
ib.....	3220	544
notice of, delay in, when excused.....	3158	536
notice of, may be waived.....	3159	536
notice of, how waived.....	3160	536
notice of, acceptor for honor entitled to.....	3206	542
notice of, acceptance for honor does not excuse.....	3207	543
See ACCEPTANCE; BILL OF EXCHANGE; NEGOTIABLE INSTRUMENT; PRESENTMENT.		
<b>DISSOLUTION:</b>		
<b>Of MARRIAGE:</b>		
how effected.....	90	24
See DIVORCE.		
<b>Of CORPORATIONS: See CORPORATIONS.</b>		
<b>Of PARTNERSHIP:</b>		
parties may agree not to carry on business after.....	1675	329
partners to act in best faith on.....	2411	437
general, total.....	2450	432
general, partial.....	2451	432
general partner entitled to judgment of, when.....	2452	432
liability of partners continues after, when.....	2453	433
powers of partners after.....	2468	433
special.....	2509	441
by renunciation.....	2417	428
See PARTNERSHIP.		
<b>DISTRESS:</b>		
taking unfair advantage of, is undue influence.....	1375	313
<b>DISTRIBUTION:</b>		
of common proper on divorce.....	147	36
order for, subject to revision on appeal.....	149	37
of capital stock, on dissolution of corporation.....	315	72
of property of intestate.....	1385	279
ib.....	1386	279
of property of intestate, effect of advancements on.....	1390	283
ib.....	1391	283
ib.....	1394	283
See APPORTIONMENT.		
<b>DISTRICT COURT:</b>		
action may be brought in, to affirm unsolemnized marriage...	76	21
Judge of, may hear and determine complaints of corporation elections.....	314	71
action in, to recover possession of property.....	795	176
when to execute power.....	937	196
Trustee may be discharged by.....	2282	411
ib.....	2283	411
when becomes Trustee.....	2289	412
when may appoint Trustee.....	2287	411
creditor of mortgageor may have action in, to recover debt...	2976	566
power of Court on such proceedings.....	2976	566
See COURT.		
<b>DIVIDENDS: See CORPORATIONS.</b>		
<b>DIVORCE:</b>		
dissolves marriage.....	90	24



	Section.	Page.
<b>DIVORCE: (Continued.)</b>		
defined .....	91	24
for what causes may be granted.....	92	25
adultery as a ground for.....	93	25
adultery, when not a ground for.....	124	81
extreme cruelty as a ground of.....	94	25
wilful desertion as a ground of.....	95	25
wilful neglect as a ground of.....	106	27
habitual intemperance as a ground of.....	107	28
conviction of felony as a ground of.....	108	28
when to be denied.....	112	29
ib.....	124	31
ib.....	131	34
connivance as ground for denying.....	113	29
collusion as ground for denying.....	115	29
condonation as ground for denying.....	116	29
condonation, when operates as a bar to.....	119	30
recrimination as a ground of denying.....	122	31
lapse of time as a ground of denying.....	125	32
no limitations in actions for.....	127	32
when only may be granted.....	128	32
proof of actual residence required in.....	129	33
rules of practice in actions for.....	130	33
additional affirmative statements required in complaint.....	131	34
not to be granted by default.....	132	34
when denied, certain relief may be allowed.....	136	35
expense of action and alimony.....	137	35
disposition of children.....	138	35
support of wife and child.....	139	35
security for maintenance and alimony.....	140	35
what property resorted to in providing alimony and relief.....	141	35
when relief not to be granted to wife.....	142	35
legitimacy of issue.....	145	36
ib.....	146	36
disposition of common property on.....	147	36
disposition of common property on, rendered on adultery.....	148	37
See CONDONATION; COLLUSION; RECRIMINATION; MAR-		
RIAGE.		
<b>DOMINANT TENEMENT:</b>		
defined .....	803	177
in case of partition of, burdens, how apportioned.....	807	177
rights of owner of future.....	808	177
actions by owner and occupant of.....	809	177
See EASEMENTS; SERVITUDES.		
<b>DOUBLE INSURANCE:</b>		
defined.....	2641	459
contribution of insurers in case of.....	2642	459
See INSURANCE.		
<b>DOUBTFUL WORDS:</b>		
interpretation of, in grant.....	1069	220
interpretation of, in will.....	1323	270
interpretation of, in contract.....	1656	326
See INTERPRETATION.		
<b>DOMESTIC ANIMALS:</b>		
corporations for insuring lives of, may be formed.....	286	61
corporations for improving breed of, may be formed.....	286	61
are property .....	655	155
<b>DRAWEE:</b>		
of bill of exchange, defined.....	3171	537

	Section.	Page.
<b>DRAWEE:</b> ( <i>Continued.</i> )		
bill payable by, where.....	3176	538
bill may be presented for acceptance to, when.....	3185	539
presentment to, how made.....	3186	539
bound by refusal of joint drawee.....	3187	540
acceptance by.....	3193	540
presentment to, when excused.....	3219	544
in case of need.....	3172	538
presentment to, when necessary.....	3188	540
See ACCEPTANCE; BILL OF EXCHANGE.		
<b>DRAWER:</b>		
of bill of exchange, defined .....	3171	537
must execute it in three parts, if desired.....	3174	538
rights and obligations of.....	3179	538
when exonerated by delay in presentment.....	3213	543
capacity of, admitted by acceptance. ....	3199	543
signature of, admitted by acceptance, when.....	3199	542
acting fraudulently, not entitled to notice.....	3220	544
bill drawn on and accepted by, is promissory note .....	3246	547
of check, when exonerated by delay in presentment.....	3255	548
See BILL OF EXCHANGE.		
<b>DRUNKARDS:</b>		
habitual, are persons of unsound mind .....	24	8
See PERSONS OF UNSOUND MIND.		
<b>DUEL:</b>		
damages for injuries inflicted in.....	3348	566
ib.....	3349	567
<b>DUPLICATE:</b>		
revocation of either copy of, of will, revokes the other.....	1294	285
alteration, etc., of one copy of, of contract, does not affect the other.....	1701	333
See COPY.		
<b>DURESS:</b>		
defined.....	1569	312
will obtained through, may be denied probate.....	1272	261
contract procured by, voidable.....	1567	311
ib.....	1689	331
See MENACE; UNDUE INFLUENCE; THREAT.		
<b>E</b>		
<b>EARNINGS:</b>		
of wife not liable for debts of husband.....	174	40
of wife, living separate, her separate property.....	175	40
of minor children her separate property, when living separate	175	40
of legitimate unmarried minor, father entitled to .....	197	43
of illegitimate unmarried minor, mother entitled to.....	200	44
See WAGES.		
<b>EASEMENTS:</b>		
what are.....	801	176
by whom may be granted.....	803	177
by whom may be held.....	805	177
extent of, how determined.....	806	177
partition of burden of.....	807	177
who may use.....	808	177
who may enforce.....	809	177
do not prevent owner of land from suing for possession.....	810	177

# INDEX.

673

	Section.	Page.
<b>EASEMENTS: (Continued.)</b>		
how extinguished.....	811	178
instrument granting, a real instrument .....	1092	223
instrument granting, witness not necessary to its validity.....	1098	225
what, pass by transfer of real property.....	1129	233
See SERVITUDES.		
<b>EASTERLY:</b>		
defined .....	1074	221
<b>ELECTION: See CORPORATIONS.</b>		
<b>EMBLEMENTS:</b>		
right of tenant to.....	819	179
See CROPS.		
<b>EMPLOYÉ:</b>		
defined .....	1965	369
entitled to indemnification, when.....	1969	369
ib. ....	1971	370
when not entitled to indemnification .....	1970	369
gratuitous, obligations of.....	1975	370
ib.....	1976	370
with power of attorney, must act.....	1977	371
for reward, obligations of.....	1978	371
for his own benefit, obligations of.....	1979	371
cannot be bound for more than two years.....	1980	371
must obey employer.....	1981	371
must serve according to usage.....	1982	372
must use reasonable skill.....	1983	372
must use whatever skill he has.....	1984	372
everything acquired by, by virtue of employment, belongs to employer.....	1985	372
must give account.....	1986	372
not bound to deliver without demand.....	1987	373
must give preference to employer's business.....	1988	373
must give preference to several employers in order.....	1988	373
how far liable for substitute.....	1989	373
surviving, when to act.....	1991	373
discharged by notice of death or incapacity of employer.....	1996	374
when to continue service after employer's death, etc.....	1998	374
entitled to compensation from employer's successor.....	1998	374
may be discharged for fault.....	2000	375
compensation of, when dismissed for fault.....	2002	375
compensation of, when quits for cause.....	2003	375
may quit service, when.....	2001	375
See AGENT; FACTOR; SERVANT.		
<b>EMPLOYER:</b>		
defined .....	1965	369
when must indemnify employé.....	1969	369
ib.....	1971	370
when must not indemnify employé.....	1970	369
cannot enforce contract of service beyond two years.....	1980	371
employé must obey.....	1981	371
entitled to all acquired by employé in course of service.....	1985	372
entitled to an account from employé.....	1986	372
preference to be given to business of.....	1988	373
preference to be given to business of several, in order.....	1988	373
employé liable to, for substitute, how far.....	1989	373
employé liable to, for damage on account of negligence.....	1990	373
employment terminated by death or incapacity of.....	1996	374
ib.....	2001	375

	Section.	Page.
<b>EMPLOYER : (Continued.)</b>		
may be terminated by, when.....	2000	375
employé quitting for cause, entitled to what compensation.....	2003	375
See MASTER ; PRINCIPAL.		
<b>EMPLOYMENT :</b>		
defined .....	1965	369
termination of, by death or incapacity.....	1996	374
when services must be continued after certain notice.....	1998	374
termination of.....	1997	374
termination of, at will.....	1999	374
termination of, by employer, for fault.....	2000	375
termination of, by employé, for fault.....	2001	375
right of employé to compensation after termination.....	2003	375
terminated for cause, employé not entitled to compensation...	2002	375
confidential obligations of, where regulated.....	1992	373
service without.....	2078	384
ib.....	2079	385
See AGENCY ; SERVICE.		
<b>ENCUMBRANCE :</b>		
resulting trust not to prejudice.....	856	164
power of sale to, when deemed part of security. ....	894	190
grant, how far conclusive as to.....	1123	232
when included in term " purchaser for value" .....	1200	246
instruments, when void against.....	1227	251
instruments, when not void against.....	1228	251
rights of, under devise, when not impaired by his conveyance	1364	276
must show what, as against unrecorded instrument.....	2944	501
when personal mortgage is void against subsequent.....	2971	507
ib.....	2973	507
obligation respecting real property not enforced against sub-		
sequent.....	3395	576
without notice, conditional transfer absolute in favor of.....	2923	498
certain transfers void against.....	3440	583
lien of seller or buyer not valid against subsequent.....	3048	518
grant by person having power of revocation operates as revo-		
cation in favor of, when.....	1229	251
See GRANT ; LIEN ; MORTGAGE ; NOTICE ; RECORDING ;		
PURCHASER.		
<b>ENCUMBRANCES :</b>		
defined .....	1114	230
unrecorded instrument void, as against.....	1209	248
Sheriff's grant has relation to, as muniment of title.....	1210	248
imposed on devised property does not revoke will.....	1301	266
what, are protected by recording laws.....	2943	501
prima facie presumed to be acquired in good faith.....	2944	501
covenant " against encumbrances imposed or suffered by		
grantor " a Special Code Covenant.....	1105	227
ib.....	1111	229
such covenant does not run with the land.....	1116	231
damages for breach of such covenant.....	1118	231
ib.....	3315	560
covenant against all, a General Code Covenant.....	1113	230
covenant against all, defined .....	1113	230
covenant against all, damages for breach of.....	1118	231
ib.....	3313	560
See DEBT ; LIEN ; MORTGAGE.		
<b>ENEMY, PUBLIC :</b>		
performance excused when prevented by.....	1511	362
innkeeper not liable for damages caused by.....	1859	354
carrier not liable for damages caused by.....	2194	399
cannot be insured.....	2460	446

# INDEX.

675

	Section.	Page.
<b>ENTICEMENT: See ABDUCTION.</b>		
<b>EQUAL RIGHTS:</b>		
the law does not interfere with possessors of.....	3524	597
<b>ESCHEAT:</b>		
when property passes by.....	1306	279
ib. ....	1401	285
<b>ESCROW:</b>		
defined.....	1059	216
<b>ESTATES:</b>		
in dower and courtesy abolished.....	179	41
interests in real property are.....	699	161
qualities of expectant.....	699	161
ib. ....	700	162
in real property.....	761	170
fee simple.....	762	170
fees-tail and conditional fees abolished.....	763	170
freeholds.....	765	171
for years.....	765	171
at will.....	765	171
for life, of third person.....	766	171
future.....	767	171
in reversion.....	768	171
in remainder.....	769	171
successive, for life, limitation on.....	774	172
creation of remainders, future and contingent estates.....	773	172
termination of.....	788	174
right to actual possession, creates legal.....	848	182
disposition of, to whom must be made.....	850	183
of owner for life, when changed to fee.....	918	193
married woman may create what.....	914	193
of intestates, how distributed.....	1386	279
See INTERESTS; REAL PROPERTY.		
<b>EVIDENCE:</b>		
of common law, where found.....	5	2
of witness, privileged.....	47	13
of condonation.....	118	30
ib.....	119	30
certified copy of articles of incorporation as.....	298	67
of titles declared by judgment, how recorded.....	1161	236
of witness proving handwriting to an instrument, must prove what.....	1188	244
certificate of shipmaster as to exertions of seamen to save vessel presumptive.....	2059	382
certificate of change of names in partnership presumptive, of facts therein.....	2471	435
of loss to be given to insurer.....	2634	458
See PROOF.		
<b>EXCESS:</b>		
disposition in, of power.....	911	193
conveyance in, by owner of life estate.....	1124	232
of advancement by testator during lifetime, effect of.....	1391	282
execution by agent in, of authority, when binds principal.....	2333	418
<b>EXCHANGE:</b>		
when title to personal property passes by.....	1140	234
when title to personal property passes under executory agree- ment of.....	1141	234
defined.....	1804	349

	Section.	Page.
<b>EXCHANGE: (Continued.)</b>		
form of contract for.....	1805	349
rights and obligations of parties to.....	1806	349
of money, implied warranty thereon.....	1807	350
deposit for.....	1818	351
deposit for, relation of parties in.....	1878	358
<b>EXECUTED:</b>		
contract, voluntary transfer is.....	1040	216
consideration may be, or executory.....	1609	319
contract, defined.....	1661	327
See CONTRACT.		
<b>EXECUTION:</b>		
sale of franchise of corporations under.....	388	90
where proceedings under, against corporations, may be had...	393	91
chattel interest not liable to sale under.....	765	171
exemption of homestead from.....	1237	252
debts for which homestead liable for sale on.....	1239	253
of instruments affecting homesteads.....	1240	253
of homestead declaration.....	1254	257
of will (see WILL).		
of power (see POWER).		
of instruments (see INSTRUMENTS).		
of codicil, effect of, on previous will.....	1286	263
of accord, necessary to its validity.....	1522	304
of contract in writing, effect of.....	1625	322
of authority, when principal bound by incomplete.....	2331	418
of authority, when principal bound by in excess.....	2333	418
<b>EXECUTOR:</b>		
when may bind out child to apprenticeship.....	267	55
who entitled to letters as, though not named.....	1371	277
cannot have power to appoint executor.....	1372	277
not to act till qualified.....	1373	277
See PERSONAL REPRESENTATIVES.		
<b>EXECUTORY:</b>		
contract, grant on condition precedent on.....	1058	218
contract, a real instrument, when.....	1092	223
witness not necessary to its validity, when.....	1098	225
agreement transfers title to buyer, when.....	1141	234
consideration may be.....	1609	319
consideration need not be stated.....	1610	319
consideration, how ascertained.....	1611	320
contract of marriage must be in writing.....	1624	321
contract, defined.....	1661	327
contract, agreement for sale of real property on.....	1731	339
contract, authority of agent to execute to be in writing.....	1732	339
contract, form of execution of.....	1733	339
contract, covenants, when required by such.....	1734	339
instrument in writing, implied warranty on sale of.....	1774	346
See AGREEMENT; CONTRACT.		
<b>EXEMPLARY DAMAGES:</b>		
minors and persons of unsound mind not liable in.....	36	10
<b>EXEMPTION:</b>		
of homesteads from execution.....	1237	253
ib.....	1239	253
of property from operation of mortgage.....	2969	506
ib.....	2970	507
ib.....	2971	507

# INDEX.

677

	Section.	Page.
<b>EXONERATION :</b>		
of innkeeper from liability to guest.....	1860	356
of owner from claim of finder.....	1871	358
of finder from liability to owner.....	1865	357
of lender from liability to borrower.....	1892	360
of shipmaster, on abandonment of ship .....	2041	380
of carrier, on delivery of goods to holder of bill of lading....	2131	391
of partner, on renunciation of future profits.....	2417	428
of guarantors.....		487
of surety.....	2840	487
ib.....	2845	488
of gratuitous pledge holder.....	2996	511
<b>EXPECTATION :</b>		
failure of, represented, does not avoid insurance.....	2677	463
<b>EXPRESS CONTRACT :</b>		
defined .....	1630	321
See CONTRACT.		
<b>EXTENSION :</b>		
of time of delinquent sale of stock.....	345	80
of corporate existence of corporations.....	404	93
ib.....	405	93
of time of performance of contract.....	1698	332
<b>EXTINCTION :</b>		
<b>OF OBLIGATIONS :</b>		
by performance.....	1473	296
by offer of performance.....	1485	298
of pecuniary obligation.....	1500	301
when part performance operates as.....	1524	304
by accord .....	1521	304
by satisfaction .....	1523	304
by novation.....	1530	305
by release.....	1542	307
<b>OF CONTRACTS :</b>		
how effected.....	1682	331
by rescission.....	1688	331
<b>OF TRUST :</b>		
effect of.....	2282	412
<b>OF NEGOTIABLE INSTRUMENTS :</b>		
how effected.....	3164	536
revival after.....	3165	537
<b>OF LIENS :</b>		
by sale or conversion.....	2910	496
lapse of time does not operate as.....	2911	496
by restoration .....	2912	496
<b>F</b>		
<b>FACT :</b>		
concealment of, in certain case makes condonation void.....	120	30
mistake of, defined.....	1577	315
mistake of foreign law is mistake of.....	1579	315
actual fraud a question of.....	1574	313
fraudulent intent a question of.....	3443	583
<b>FACTOR :</b>		
defined .....	2026	378
duties of.....	2027	378
may sell on credit.....	2028	378
ib.....	2368	422

	Section.	Page.
<b>FACTOR:</b> ( <i>Continued.</i> )		
liability of, under guaranty commission.....	2029	378
cannot relieve himself from liability.....	2030	378
actual authority of.....	2368	422
ostensible authority of.....	2369	422
guaranty of, need not be in writing.....	2794	480
lien of.....	3061	520
See PRINCIPAL; AGENT.		
<b>FALSE:</b>		
representation in insurance, when deemed.....	2579	452
representation in insurance, effect of.....	2580	452
representation in marine insurance, effect of.....	2676	463
representation in marine insurance, eventually, of expectation, effect of.....	2677	463
certificate by officer of corporation.....	316	72
See FRAUD; FRAUDULENT.		
<b>FARE:</b>		
of passenger may be demanded at any time.....	2187	398
passenger may be ejected for non-payment of.....	487	115
ib.....	2188	398
ejectment forfeits right of carrier..	2189	398
carrier's lien for.....	2190	398
<b>FATHER:</b>		
of legitimate unmarried minor entitled to his custody and services .....	197	43
consent of, when necessary to apprentice child.....	265	54
See PARENT.		
<b>FEE SIMPLE:</b>		
what .....	762	170
title, when presumed to pass.....	1077	221
ib.....	1121	231
See ESTATES; REAL PROPERTY.		
<b>FELONY:</b>		
effect of conviction of, on marriage relations.....	108	28
limitation of action for divorce on ground of conviction of....	124	31
<b>FEMALES:</b>		
under eighteen considered minors.....	17	7
of fifteen and upwards capable of marrying.....	56	16
<b>FENCE:</b>		
right of having, maintained by coterminous owners, an ease- ment.....	801	176
tenant for life to keep, in repair.....	840	181
coterminous owners, when bound to maintain.....	841	181
<b>FERRY CORPORATIONS:</b> See CORPORATIONS; BRIDGE CORPORA- TIONS.		
<b>FEUDAL TENURES:</b>		
with their incidents, abolished.....	1127	233
<b>FICTITIOUS:</b>		
name in partnership, when may be used.....	2466	434
ib.....	2467	434
payee, negotiable instrument may be payable to.....	3103	536
<b>FILING:</b>		
of inventory of wife's separate property with Recorder.....	171	39



	Section.	Page.
<b>FILING:</b> ( <i>Continued.</i> )		
effect of such.....	172	39
effect of failure in such inventory.....	173	39
of articles of incorporation.....	291	65
of articles, prerequisite to.....	293	65
<i>ib.</i> .....	296	66
of articles, duty of Secretary of State after.....	297	66
affidavits of sale of delinquent stock.....	348	81
<i>See</i> RECORDING.		
<b>FINDER:</b>		
not bound to take charge of thing found.....	1864	356
taking charge, is depositary for hire.....	1864	356
must give notice to owner.....	1865	357
may require proof of ownership.....	1866	357
entitled to compensation.....	1867	357
may exonerate himself by storing thing found.....	1868	357
may sell thing found, when.....	1869	357
such sale, how made by.....	1870	357
owner may exonerate himself by surrendering thing found...	1871	358
absolutely entitled to thing abandoned.....	1872	358
<b>FIRE:</b>		
involuntary deposit may be made in case of.....	1815	350
duty of depositary in such case.....	1816	351
<b>FIRE INSURANCE:</b> <i>See</i> INSURANCE.		
<b>FISHING:</b>		
right of, as an easement.....	801	176
right of, as a servitude.....	802	176
<b>FIXTURES:</b>		
are real property.....	658	156
what are.....	660	156
ownership of.....	1013	212
<b>FORBEARANCE:</b>		
of money, called interest.....	1915	362
<b>FORCE:</b>		
may be employed in protecting person, property and relatives	49	13
marriage obtained through, void.....	58	18
marriage obtained through, may be annulled.....	82	22
<i>See</i> DURESS; MENACE; UNDUE INFLUENCE.		
<b>FORCIBLE ENTRY:</b>		
damages for.....	3346	566
<b>FORECLOSURE:</b>		
of right of redemption of mortgageor.....	2931	499
<i>ib.</i> .....	2975	508
of mortgageor's right of redemption, by pledgee.....	3011	513
<i>See</i> MORTGAGE; PLEDGE.		
<b>FOREIGN BILLS:</b> <i>See</i> BILLS OF EXCHANGE.		
<b>FOREIGN CORPORATIONS:</b> <i>See</i> CORPORATIONS.		
<b>FOREIGN LAW:</b>		
persons made adults by, how deemed in this State.....	22	8
persons made minors by, how deemed in this State.....	23	8
mistake of, is mistake of fact.....	1579	315

	Section.	Page.
<b>FOREIGN NAVIGATION:</b>		
defined .....	962	201
<b>FOREIGN SHIP:</b>		
defined.....	963	201
<b>FORFEITURE:</b>		
of powers by corporations for non-user.....	369	86
of servitudes for non-user.....	811	178
conveyance by owner for life or years, in excess of his title		
does not work .....	1124	232
interpretation of conditions involving.....	1442	292
of wages of seamen.....	2063	363
contract for, of property subject to lien, void.....	2889	493
<b>FORGETFULNESS:</b> See NEGLIGENCE.		
<b>FORM:</b>		
of solemnizing marriages, no particular .....	71	20
of notice of assessment.....	335	77
of notice of delinquency.....	337	78
of notice to tenant at will to quit.....	789	174
of grant, simple.....	1102	236
of grant, with Special Code Covenants .....	1107	237
of grant, with General Code Covenants.....	1108	238
of certificate of acknowledgment .....	1176	240
of certificate of acknowledgment by attorney in fact. ....	1178	241
of certificate of acknowledgment by married woman.....	1180	241
of grant in execution of agreement for sale of real property..	1733	339
of Common Law Covenants, in execution of executory contract		
.....	1735	340
of warranty in policy of insurance.....	2605	455
of real mortgage.....	2938	500
of personal mortgage.....	2961	504
of notice of dishonor.....	3143	533
<b>FORMALITIES:</b>		
certain, directed, in execution of power to be disregarded.....	904	101
<b>FRANCHISE:</b>		
considered as property, and may be sold under execution.....	388	90
duties of purchaser of.....	389	90
ib.....	390	90
redemption of .....	393	91
See CORPORATIONS.		
<b>FRAUD:</b>		
marriage contracted through, void.....	68	18
in contracting marriage, ground for annulling.....	82	22
desertion induced by.....	97	26
ground for annulling indentures of apprenticeship.....	276	56
instruments in execution of power, how affected by.....	916	193
where it is mutual, instrument void against purchaser with		
notice.....	1228	251
contract obtained through, voidable, .....	1567	311
ib.....	1689	331
contract, when deemed to be obtained through.....	1568	311
either actual or constructive.....	1571	312
actual, defined.....	1572	313
actual, a question of fact.....	1574	313
constructive, defined.....	1573	313
contract prevented from being put in writing by, may be enforced, when.....	1623	321
contract for exemption from liability of one's own, void.....	1668	328

# INDEX.

681

	Section.	Page.
<b>FRAUD: (Continued.)</b>		
by-bidding a.....	1797	348
thing gained by, held in trust.....	2224	404
agent cannot have authority to commit.....	2306	414
return of premium in insurance, for.....	2619	456
insurer, when liable for loss through.....	2629	458
exemplary damages may be given in case of.....	3294	556
interest as damages may be given in case of.....	3288	555
See MENACE; DURESS; DECEIT; UNDUE INFLUENCE;		
FRAUDULENT.		
<b>FRAUDULENT:</b>		
concealment of facts makes condonation void.....	120	30
transfer, when deemed, as against creditors.....	854	183
omission to communicate certain facts avoids insurance.....	2562	449
ib.....	2569	450
valuation under marine insurance, effect of.....	2736	471
misrepresentation by debtor as to value of pledge, effect of....	2999	511
instrument, when void against purchasers.....	1227	251
instrument, when not void against purchasers.....	1228	251
instrument, power to revoke, when deemed executed.....	1229	251
ib.....	1230	251
instrument, other provisions concerning.....	1231	252
instrument, when void against creditors.....	3439	582
instrument, may be valid in favor of purchaser.....	3441	583
instrument, can be avoided by judgment creditor only.....	3442	585
intent, a question of fact.....	3443	583
<b>FREE:</b>		
consent to marriage must be.....	58	18
consent to contract must be.....	1565	311
consent to contract not, may be rescinded.....	1566	311
consent apparent, when not.....	1567	311
See CONSENT; DURESS; UNDUE INFLUENCE.		
<b>FREEHOLD:</b>		
defined.....	765	171
See ESTATES; REAL PROPERTY.		
<b>FREIGHT:</b>		
defined.....	2110	387
whose directions govern delivery of.....	2115	388
carrier must not stow on deck.....	2117	388
where to be delivered.....	2118	389
ib.....	2119	389
notice of arrival of, when necessary.....	2120	389
may be stored by carrier, when.....	2121	389
ib.....	2122	389
bill of lading for.....	2126	390
carrier, how exonerated from liability for.....	2131	391
freightage for, payable when.....	2136	391
freightage for, payable by whom.....	2137	391
ib.....	2138	392
freightage for, apportionment of.....	2140	392
ib.....	2141	392
ib.....	2142	392
when carried further than agreed.....	2143	392
carrier's lien on, for freightage.....	2144	392
liability of inland carriers for loss of.....	2194	399
liability of marine carriers for loss of.....	2197	399
consignor of valuable, to declare its nature.....	2200	399
delivery of, beyond usual route.....	2201	400

	Section.	Page.
<b>FREIGHT: (Continued.)</b>		
proof to be given in case of loss.....	2202	400
freightage not chargeable on natural increase of.....	2139	392
hypothecation of, by respondentia.....	3038	517
damages for carrier's refusing to carry.....	3325	563
damages for carrier's refusing to deliver.....	3326	563
ib.....	3327	563
See CARGO; FREIGHTAGE; GENERAL AVERAGE; CARRIER; RESPONDENTIA; BILL OF LADING.		
<b>FREIGHTAGE:</b>		
when wages of seamen depend on.....	2054	393
when wages of seamen do not depend on.....	2058	392
defined.....	2110	387
when payable.....	2136	391
consignor, when liable for.....	2137	391
consignee, when liable for.....	2138	391
not chargeable on increase of freight.....	2139	392
apportionment of, by contract.....	2140	392
apportionment of, by operation of law.....	2141	392
apportionment according to distance.....	2142	392
extra, when not allowed.....	2143	392
lien for.....	2144	392
how valued on general average.....	2153	394
liable for certain contracts of shipmaster.....	2376	423
ib.....	2380	424
master of ship may hypothecate.....	2377	423
ship's manager cannot give up lien for.....	2389	424
ship's manager may settle for.....	2388	424
in marine insurance, signifies what.....	2661	461
who has insurable interest in.....	2662	461
insurable interest in, when exists.....	2663	462
how affected by abandonment of ship.....	2730	470
when shipmaster may hypothecate under bottomry.....	3021	515
shipmaster has lien upon.....	3063	521
seaman has lien upon.....	3064	521
See CARGO; CARRIER.		
<b>FUNDS:</b>		
order of resort to different.....	2899	494
<b>FURTHER ASSURANCE:</b>		
executory contract for sale binds seller to insert covenant of... See COVENANTS.	1734	339
<b>FUTURE:</b>		
representation in insurance as to, when a promise.....	2574	451
warranty in insurance may relate to.....	2606	455
warranty in insurance as to, what deemed.....	2608	455
<b>FUTURE ESTATES:</b>		
what.....	767	171
rights of owner of, in dominant tenement.....	808	177
See FUTURE INTEREST; ESTATES; REAL PROPERTY; REMAINDERS.		
<b>FUTURE INTEREST:</b>		
defined.....	690	160
is either vested or contingent.....	693	161
vested.....	694	161
contingent.....	695	161
two or more, may be created in alternative.....	696	161
not void because improbable.....	697	161
right of posthumous children in.....	698	161

	Section.	Page.
<b>FUTURE INTEREST: (Continued.)</b>		
how pass.....	699	161
mere possibility is not transferable.....	700	162
none, except those specified.....	703	162
suspending alienation, void.....	716	163
when defeated.....	739	166
ib.....	740	166
when not defeated.....	741	166
ib.....	742	166
in personal property, how protected.....	947	199
contingent on death without issue, etc., construction of.....	1075	221
lien may be created on.....	2883	493
See ESTATES; REAL PROPERTY; REMAINDERS.		
<b>G</b>		
<b>GAME:</b>		
right of taking, may be held as an easement.....	801	176
right of taking, may be held as a servitude.....	802	176
<b>GAS CORPORATIONS:</b>		
may be formed.....	286	61
to obtain privilege from city or town.....	628	145
to use what meters.....	628	145
gas to be supplied on written application.....	629	146
damages for refusal.....	629	146
when may refuse to supply gas.....	630	146
pipes of, how laid.....	631	146
agent of, may inspect meters.....	632	146
when persons neglect to pay, gas may be shut off.....	633	147
See CORPORATIONS.		
<b>GENERAL AVERAGE:</b>		
defined.....	2148	393
how calculated.....	2152	393
ib.....	2153	394
cargo on deck, when entitled to benefit of.....	2154	394
See FREIGHT; INSURANCE; LOSS.		
<b>GIFT:</b>		
defined.....	1146	234
how made.....	1147	235
what not revocable.....	1148	235
in view of death, what.....	1149	235
in view of death, when presumed to be.....	1150	235
in view of death, revocation of.....	1151	235
in view of death, effect of will upon.....	1152	235
in view of death, when treated as a legacy.....	1153	235
in view of death, may be satisfied.....	1367	276
to subscribing witness to will, when void.....	1281	263
subscribing witness may take as much by, as by succession...	1282	262
certain words in will, when words of...	1335	271
deemed an ademption of legacy, when.....	1351	273
See DEVISE; BEQUEST; LEGACY.		
<b>GOOD FAITH:</b>		
children of illegal marriage contracted in.....	84	23
holder of recorded instrument presumed to be in.....	1206	247
offer of performance must be made in.....	1493	300
trustee bound to act in highest.....	2228	404
partner bound to act in highest.....	2411	427
partner not bound by act not in, except to persons acting in...	2431	430
principal bound by ostensible authority only to persons acting in.....	2334	418

	Section.	Page.
<b>GOOD FAITH: (Continued.)</b>		
agent not bound by act believed in, to be within authority....	2343	419
agent must be indemnified for advance made in, when.....	2344	420
partner relieved from liability by renouncing in future profits..	2417	428
encumbrance prima facie presumed to be acquired in.....	2944	501
See PURCHASER; ENCUMBRANCE.		
<b>GOOD WILL:</b>		
is property.....	655	155
ib.....	993	209
defined.....	992	209
seller of, may agree not to carry on same business in county..	1674	329
implied warranty in sale of.....	1776	347
partner cannot dispose of.....	2430	430
<b>GRACE:</b>		
days of, not allowed.....	3181	539
<b>GRANT:</b>		
power to dispose of property by, how executed.....	902	191
a transfer in writing.....	1052	218
when takes effect.....	1054	218
date.....	1055	218
term includes, what.....	1053	218
on condition subsequent, property to be reconveyed for non-		
performance of conditions in.....	1057	218
on condition precedent, an executory contract.....	1058	218
surrendering or cancelling does not operate as retransfer.....	1060	219
thing granted must be capable of identification.....	1073	221
a "real instrument".....	1092	224
witness not necessary to its validity.....	1098	225
by married woman void, unless acknowledged, how.....	1093	224
no covenant implied in any, except.....	1103	227
what title passes by.....	1082	223
ib.....	1120	231
fee simple title presumed to pass.....	1077	221
ib.....	1121	231
in fee simple carries with it subsequent acquired title.....	1122	231
ib.....	1078	222
how far conclusive against grantor.....	1123	232
how far conclusive on purchaser.....	1123	232
by owner for life or years.....	1124	232
of title to highway.....	1125	232
valid without attornment of tenant.....	1126	232
what easements pass by.....	1129	233
covenant against prior, by the grantor, Special Code.....	1105	227
covenant against prior, defunct.....	1110	228
from subsequent grantee without notice of prior unrecorded,		
valid.....	1204	247
when prior and subsequent both recorded, vendee under latter		
takes with notice.....	1205	247
of sheriff, subject to provisions of chapter on Recording. ....	1211	248
<b>Delivery:</b>		
necessary.....	1054	218
presumption of time of.....	1055	218
to grantee necessarily absolute.....	1058	218
in escrow.....	1059	219
constructive.....	1061	219
<b>Interpretation:</b>		
how made.....	1065	220
in what consists.....	1066	220
of limitations.....	1067	220
by aid of recitals.....	1068	220
of ambiguous language.....	1069	220

	Section.	Page.
<b>GRANT: (Continued.)</b>		
against grantor.....	1070	221
to give consistency to all parts.....	1071	221
of irreconcilable provisions.....	1072	221
of "northerly," "southerly," "westerly," "easterly".....	1074	221
of "heirs," "issue," etc.....	1076	221
<b>Form:</b>		
simple.....	1102	226
with Special Code Covenants.....	1107	227
with General Code Covenants.....	1108	228
in execution of agreement of sale.....	1733	339
See TRANSFER; COVENANTS; RECORDING; REAL INSTRUMENTS; INTERPRETATION.		
<b>GRANTEE:</b>		
of rents and reversions, rights of.....	821	179
delivery of grant to, necessarily absolute.....	1056	218
interpretation in favor.....	1070	221
payment of rent to grantor, when binding on ..	1126	233
See GRANT.		
<b>GRANTOR:</b>		
interests remaining in, of express trusts.....	866	186
of trust, may devise property to take effect on termination of trust .....	884	185
of power, defined.....	880	188
may reserve power.....	891	189
who may be, of power.....	888	189
directions of, of power, how far binding.....	903	191
ib. ....	904	191
ib. ....	905	192
ib. ....	906	192
reserving absolute power of revocation, deemed owner.....	923	194
property to be reconveyed to, on failure to perform conditions intention of, how determined where grant is ambiguous.....	1057	218
payment of rent to, when binding on grantee.....	1069	220
See GRANT; POWER.	1126	232
<b>GREATER:</b>		
contains the less.....	3536	599
<b>GUARANTEE:</b>		
must give notice of acceptance of offer to guaranty.....	2795	481
when guarantor liable to.....	2807	483
certain dealings of, with principal, exonerate guarantor.....	2819	484
guarantor not exonerated by voidable promise of.....	2820	484
guarantor not exonerated by delay of.....	2823	485
guarantor with indemnity, not exonerated by dealings of, with principal. ....	2824	485
guarantor partially exonerated by partial payment to.....	2822	485
See CREDITOR; GUARANTOR; GUARANTY; SURETY.		
<b>GUARANTOR:</b>		
may become such without consent of principal.....	2788	479
must sign guaranty.....	2793	479
notice to, of acceptance of guaranty, when necessary.....	2795	481
of performance liable without notice.....	2807	483
of conditional obligation, liability of.....	2808	483
not liable for more than principal.....	2809	483
not liable on unlawful contract of principal. ....	2810	483
liable notwithstanding personal disability of principal.....	2810	483
may revoke continuing guaranty, when.....	2815	484
exonerated by certain acts of creditor.....	2819	484
liability of, not restored by rescission, when.....	2821	484

	Section.	Page.
<b>GUARANTOR: (Continued.)</b>		
liability reduced in same degree as that of principal.....	2822	485
not exonerated by delay.....	2823	485
not exonerated by dealings with debtor, if indemnified.....	2824	485
not exonerated by discharge of debtor by law.....	2825	485
surety has all rights of.....	2844	488
surety exonerated in like manner with.....	2840	487
indorser has rights of.....	3121	528
See GUARANTY; SURETY.		
<b>GUARANTY:</b>		
defined.....	2767	478
knowledge of principal not necessary to.....	2768	479
consideration, when necessary to.....	2792	479
consideration need not be expressed in.....	2792	479
must be in writing.....	2793	479
when promise to answer for another not deemed.....	2794	480
when acceptance necessary to validity of.....	2795	481
interpretation of incomplete contract.....	2799	481
interpretation of, that obligation is good or collectible.....	2800	481
interpretation of, that obligation is good, not discharged by harmless omission to sue.....	2801	481
interpretation of, that obligation is good, when broken by principal leaving the State.....	2802	482
when deemed unconditional.....	2806	483
may be enforced without demand or notice, when.....	2807	483
of conditional obligation, effect of.....	2808	483
continuing, defined.....	2814	484
continuing, may be revoked, when.....	2815	484
continuing, letter of credit, when deemed.....	2864	490
liability of factor on sale under commission.....	2029	378
party to, liability of, not greater than principal's.....	2809	483
party to, where principal's contract void.....	2810	483
party to, not restored by rescission of agreement exonerating party to, reduced by partial satisfaction of principal obliga- tion.....	2821	484
party to, exonerated by certain dealings with principal.....	2822	485
not exonerated by void promise, etc.....	2819	484
not exonerated by mere delay.....	2820	484
not exonerated by release of principal, when.....	2823	485
not exonerated by legal discharge of principal.....	2824	485
See LETTER OF CREDIT; SURETY.	2825	485
<b>GUARDIAN:</b>		
legal proceedings of minor to be conducted through.....	37	10
appointment of, by Court, supersedes parent.....	204	44
what.....	236	50
kinds of.....	238	50
general, what.....	239	50
special, what.....	240	50
appointment of, by parent.....	241	50
no person can be, of estate, without appointment.....	242	50
appointment of, by Court.....	243	50
ib.....	244	51
jurisdiction of Court over.....	245	51
rules for appointment of general.....	246	51
powers of, appointed by the Court.....	247	51
duties of, of the person.....	248	51
duties of, of the estate.....	249	52
relation of guardian and ward confidential.....	251	53
death of joint guardian.....	252	53
removal of.....	253	53
appointed by parent, how superseded.....	254	53
appointed by Court, how superseded.....	255	53



	Section.	Page.
<b>GUARDIAN: (Continued.)</b>		
release of, by ward.....	256	53
discharge of.....	257	53
of insane person.....	258	53
may consent to apprenticeship of ward, when.....	265	54
See WARD.		
<b>GUEST:</b>		
innkeeper's liability for personal property of.....	1859	356
ib.....	1860	356
innkeeper has specific lien on goods of, for what.....	3054	519
extent of innkeeper's lien on goods of.....	3055	519
ib.....	3056	520
ib.....	3057	520
ib.....	3058	520
ib.....	3059	520
See INNKEEPER.		
<b>H</b>		
<b>HABITUAL DRUNKARDS:</b>		
are persons of unsound mind.....	24	8
<b>HALF BLOOD:</b>		
relatives of, inherit the same as those of whole blood, when...	1389	282
<b>HANDWRITING:</b>		
when may be proved in taking proof of executing instruments	1187	243
evidence of witness must satisfactorily prove what.....	1188	244
<b>HARM:</b>		
right of protection from.....	43	11
<b>HEAD OF A FAMILY:</b>		
defined.....	1253	256
may acquire homestead.....	1246	255
homestead declaration of.....	1252	256
See HOMESTEAD.		
<b>HEIRS:</b>		
may dispute legitimacy of issue.....	195	43
of tenant for life, when take as purchaser.....	780	173
death without, defined.....	1075	221
word not necessary to pass fee.....	1076	221
<b>HIGHWAY:</b>		
title to, passes by transfer of land bounded by.....	1125	232
<b>HIRE:</b>		
depository for, when person offering thing in performance is..	1503	302
depository for, when seller of personal property to act as.....	1748	342
apportionment of.....	1935	365
See STORAGE; DEPOSITARY; HIRING.		
<b>HIRER:</b>		
products of thing hired belong to.....	1926	364
must use ordinary care.....	1928	364
must repair certain injuries.....	1929	364
for what, may use thing let.....	1930	364
may terminate hiring, when.....	1932	364
must pay ratable portion of hire, when.....	1935	365
<b>OF REAL PROPERTY:</b>		
may repair at expense of lessor, when.....	1942	366

	Section.	Page.
<b>HIRER: (Continued.)</b>		
continued possession of, renews lease.....	1945	366
must give notice of proceedings to recover land.....	1948	366
when must pay rent.....	1947	367
of part of a room entitled to whole..	1949	367
<b>Of PERSONAL PROPERTY:</b>		
must bear ordinary expense.....	1956	368
may repair at expense of letter.....	1957	368
must return property, when and where .....	1958	368
<b>HIRING:</b>		
defined.....	1925	363
hirer entitled to product of thing during.....	1926	364
covenant for quiet possession implied in.....	1927	364
obligations of parties to.....	1928	364
ib.....	1929	364
ib.....	1930	364
when letter may terminate.....	1931	364
when hirer may terminate.....	1932	364
when terminates.....	1933	365
when terminates by incapacity or death of party.....	1934	365
apportionment of hire of.....	1935	365
<b>Of REAL PROPERTY:</b>		
obligations of parties to...	1941	365
ib.....	1942	366
ib.....	1949	367
term of, when no limit fixed.....	1943	366
of lodgings for indefinite term.....	1944	366
when presumed to be renewed.....	1945	366
notice, when necessary to terminate.....	1946	366
rent for, when payable.....	1947	367
in subdivisions of rooms, forbidden.....	1949	367
<b>Of PERSONAL PROPERTY:</b>		
obligations of parties to.....	1955	368
ib.....	1956	368
ib.....	1957	368
ib.....	1958	368
of ships.....	1959	368
See LANDLORD; TENANT.		
<b>HOLDER:</b>		
of power, defined.....	879	168
of negotiable instrument may make indorsement special, how presentment must be made by.....	3114	527
must surrender same on payment, when.....	3131	530
must give receipt, when.....	3137	532
must indemnify payer, when.....	3137	532
must give proof of loss, when.....	3137	532
notice of dishonor to be given by.....	3142	533
notice of dishonor, when to be given by.....	3143	534
notice of dishonor, how given by, when agent only.....	3149	534
certain information to, excuses presentment, etc.....	3156	535
payment to, when sufficient.....	3164	536
of bill of exchange may treat it as dishonored, when.....	3194	539
of bill of exchange, may receive qualified acceptance, when..	3195	541
of bill of exchange, not bound to receive acceptance for honor.....	3204	542
of bill of exchange, must receive payment for honor.....	3204	542
of bill of exchange, must give notice of dishonor, notwithstanding acceptance for honor.....	3206	542
of bill of exchange, for value, entitled to certain damages....	3234	546
See BILL OF EXCHANGE; NEGOTIABLE INSTRUMENT.		

# INDEX.

689

	Section.	Page.
<b>HOLIDAYS:</b>		
defined .....	3573	605
ib. ....	3574	605
ib. ....	3575	606
<b>HOMESTEAD:</b>		
defined and its exemption .....	1237	252
from what property may be taken .....	1238	253
debts from which it is not exempted .....	1239	253
conveyances, mortgages, etc., how executed, acknowledged.		
etc. ....	1240	253
how abandoned .....	1241	254
proceedings when claimed to exceed amount of exemption...	1242	254
how property disposed of on report of appraisers .....	1243	254
fees of appraiser, how paid .....	1244	255
claimant, how may enforce official duties .....	1245	255
who may acquire, and of what value .....	1246	255
declaration, what to contain .....	1252	256
"head of the family," defined .....	1253	256
declaration, how executed and recorded .....	1254	257
petition to County Judge for, what to contain .....	1260	257
Judge to appoint appraisers .....	1261	258
duty of appraisers if value exceeds \$1,000 .....	1262	258
return of appraisers, and Judge's certificate thereon .....	1263	258
title to be recorded, where and how .....	1264	259
<b>HOMESTEAD CORPORATIONS:</b>		
may be formed .....	286	61
time of corporate existence .....	557	129
by-laws to specify, what .....	558	129
by-laws to be furnished to members on demand .....	558	129
advertisement and sale of delinquent and forfeited shares .....	559	129
may borrow and loan funds, and for what time .....	560	130
minors and married women may hold stock .....	561	130
limitation of speculation in lands .....	562	131
forfeiture for speculation beyond certain extent .....	562	131
when its corporate existence terminates .....	563	131
payment of premiums .....	564	131
annual report .....	565	132
See CORPORATIONS.		
<b>HONOR:</b> See BILL OF EXCHANGE; ACCEPTANCE.		
<b>HOTEL CORPORATIONS:</b>		
may be formed .....	286	61
See CORPORATIONS.		
<b>HUSBAND:</b>		
abduction of, forbidden .....	48	13
on failure to agree to place of residence, to select .....	104	27
wife to conform to such selection, or she commits desertion...	104	27
if unfit, and wife refuses to conform, he commits desertion...	105	27
wilful neglect of, to provide for wife, ground for divorce .....	106	27
may be compelled to give alimony .....	136	35
ib. ....	137	35
may be required to give security for alimony .....	140	36
when separate property of, may be resorted to for alimony...	141	35
when wife shall support .....	144	36
legitimacy of issue when divorce granted for adultery of .....	145	36
is head of the family .....	156	38
separate property of .....	163	39
earnings of wife not liable for debts of .....	174	40

	Section.	Page.
<b>HUSBAND: (Continued.)</b>		
property of wife not liable for debts of.....	177	40
not liable for debts of wife contracted before marriage.....	176	40
power of, over common property.....	178	40
not allowed an estate by courtesy.....	179	41
liable for support of wife.....	181	41
when not liable for support of wife.....	182	41
not bound to maintain wife's children by former marriage....	200	45
consent of, not necessary to wife's disposition of property by will.....	1273	261
disposition of common property on death of.....	1397	234
contract obtained from wife by duress of, voidable.....	1569	312
contract obtained from wife by menace, voidable.....	1570	312
See MARRIAGE; WIFE.		
<b>HUSBAND AND WIFE:</b>		
mutual obligations of.....	155	38
interests separate in certain respects.....	157	38
may make contracts.....	158	38
how far may impair their legal obligations.....	159	38
mutual consent of, to separation, a sufficient consideration....	160	38
may be joint tenants or tenants in common.....	161	38
common property of.....	164	39
not answerable for each other's acts.....	180	41
property rights of, how governed.....	183	41
marriage settlements of, how executed.....	184	41
living separate, neither have superior right to custody of child	198	43
concurrence of, not necessary to execution of power by wife..	397	190
inheritance between.....	1395	233
See HUSBAND; WIFE; MARRIAGE.		
<b>HYPOTHECATION: See MORTGAGE; PLEDGE; BOTTOMRY; RESPON-</b>		
<b>DENTIA.</b>		
<b>I</b>		
<b>IDENTIFICATION:</b>		
thing granted must be capable of.....	1073	221
contracting parties must be capable of... ..	1558	310
<b>IDIOT: See PERSONS OF UNSOUND MIND.</b>		
<b>IDLE ACTS:</b>		
law neither does nor requires.....	3632	596
<b>IGNORANCE:</b>		
mistake of fact through, renders contract voidable.....	1567	311
ib.....	1577	315
See MISTAKE.		
<b>ILLEGITIMACY:</b>		
who only may raise question of.....	195	43
how proved.....	195	43
<b>ILLEGITIMATE CHILD:</b>		
mother entitled to custody of.....	200	44
consent of mother necessary to adoption of.....	224	47
effect of adoption of.....	230	48
appointment of guardian for.....	241	50
when takes by succession.....	1387	281
mother succeeds to property of intestate.....	1388	282
<b>IMPLIED CONTRACT: See CONTRACT.</b>		

# INDEX.

691

	Section.	Page.
<b>IMPOSSIBILITY :</b>		
what.....	1597	317
of performance, when an excuse for non-performance avoids contract.....	1598	317
of ascertaining object of contract avoids it, when.....	1598	317
of ascertaining consideration avoids it.....	1612	320
ib.....	1613	320
the law does not require.....	3531	598
<b>IMPOSSIBLE :</b>		
defined.....	1597	317
condition, void.....	1441	292
<b>IMPRISONMENT :</b>		
for life, effect of, on subsequent marriage.....	61	18
for life, pardon for, does not restore marriage rights.....	62	18
for life, dissolves marriage.....	90	24
ib.....	108	28
See CONFINEMENT.		
<b>IMPROBABILITY :</b>		
of contingency does not render future interest void.....	697	161
<b>IMPROVEMENTS :</b>		
miners to give bonds not to injure.....	1410	286
construction of word.....	1411	286
<b>INCAPACITY :</b>		
of minors.....	26	8
of persons of unsound mind to contract.....	33	9
ib.....	34	9
to contract marriage renders marriage void.....	58	18
physical, ground for decree annulling marriage.....	82	22
of party, terminates hiring.....	1934	365
of party, terminates employment.....	1996	374
ib.....	1997	374
ib.....	2001	375
of party, terminates agency.....	2355	421
ib.....	2356	421
<b>INCEST :</b>		
defined and forbidden.....	59	18
<b>INCIDENT :</b>		
passes by transfer of principal.....	1084	222
ib.....	1665	326
ib.....	3540	599
<b>INCOME :</b>		
defined.....	748	166
disposition of, by what rules governed.....	722	164
accumulation of, in what cases allowed.....	724	164
accumulation of, certain directions for, void.....	723	164
ib.....	725	164
allowance out of.....	726	165
undisposed of, who entitled to.....	733	165
<b>INCORPORATION :</b> See CORPORATIONS ; ARTICLES OF INCORPORATION.		
<b>INCREASE :</b>		
of property belongs to owner.....	732	165
of property lent, belongs to lender.....	1885	359
of property hired, belongs to the hirer.....	1926	364
freightage not to be charged for natural, of freight.....	2139	392
of pr perty pledged, is pledged with the property..	2989	510

	Section.	Page.
<b>INCUMBRANCES: See ENCUMBRANCES.</b>		
<b>INDEMNITY:</b>		
bond of, on transfer of non-resident's stock.....	326	75
to depositary by depositor.....	1833	353
when employ�� entitled to, from employer.....	1969	369
ib.....	1971	370
to trustee.....	2273	410
to partner for certain losses and expenses.....	2412	423
measure of, under marine insurance.....		471
measure of, under fire insurance.....	2756	474
measure of, under life and health insurance.....	2766	475
defined.....	2772	476
for future wrongful act, void.....	2773	476
for past wrongful act, valid.....	2774	476
extends to acts of agent, as well as principal.....	2775	476
to several applies to each.....	2776	476
creates joint liability with person indemnified.....	2777	477
interpretation of.....	2778	477
when person giving has rights of surety.....	2779	478
in legal proceedings, called bail.....	2780	478
in legal proceedings, by what rules governed.....	2781	478
insurance a contract of.....	2551	448
guarantor indemnified liable to extent of.....	2824	485
<b>INDENTURES:</b>		
of apprenticeship, what to contain.....	270	55
ib.....	271	55
ib.....	272	56
deposit of such.....	273	56
causes for annulling such.....	276	56
proceedings to annul.....	277	57
certificate on.....	266	56
See APPRENTICESHIP.		
<b>INDORSEE:</b>		
indorsement specifying, called special.....	3113	527
rights of.....	3129	518
in good faith for consideration, rights of.....	3123	529
in due course, defined.....	3124	529
in due course, rights of.....	3125	529
in due course, may enforce negotiable instrument though paid	3165	537
of check, rights of.....	3255	548
See NEGOTIABLE INSTRUMENT.		
<b>INDORSEMENT:</b>		
on marriage certificate.....	73	30
on indentures of apprenticeship.....	266	55
ib.....	275	56
of Insurance Commissioner, on articles of incorporation of		
insurance companies.....	296	66
necessary to transfer shares of stock.....	324	75
of Surveyor-General, on plat of selection of right of way.....	371	87
non-negotiable contract in writing may be transferred by.....	1449	204
<b>Or NEGOTIABLE INSTRUMENT:</b>		
defined.....	3108	527
how to be made.....	3109	527
may be made on separate paper, when.....	3110	527
general, defined.....	3112	527
general, how made special.....	3114	527
special, defined.....	3113	527
special, how may destroy negotiability.....	3115	527
implied warranty of.....	3116	527
before delivery to payee, effect of.....	3117	528

# INDEX.

693

	Section.	Page.
<b>INDORSEMENT: (Continued.)</b>		
without recourse, effect of.....	3118	528
ib.....	3119	528
gives privity to contract.....	3120	528
party making, has rights of guarantor.....	3121	528
for accommodation has rights of party making.....	3122	529
without consideration, when binding.....	3123	529
in due course, defined ..	3124	529
in due course, rights conferred by.....	3125	529
in due course, of instrument in blank.....	3126	530
of bill of lading, effect of .....	3127	390
See BILL OF LADING; NEGOTIABLE INSTRUMENT.		
<b>INDORSER:</b>		
defined .....	3108	527
implied warranty of....	3116	527
before delivery to payee, liable to him .....	3117	528
has rights of guarantor.....	3121	528
has rights of surety, when.....	3122	529
without recourse, how far liable .....	3118	528
without consideration, to whom liable.....	3123	529
of bill of exchange, when exonerated by delay in presentment.	3189	540
of check, when exonerated by delay in presentment .....	3255	548
notice of dishonor, how served after death of.....	3145	533
<b>INFANT: See MINOR CHILD.</b>		
<b>INFLUENCE: See ADVANTAGE; UNDUE INFLUENCE.</b>		
<b>INFORMATION:</b>		
to be given on insurance.....	2563	449
to be given on marine insurance.....	2669	462
ib.....	2670	462
what need not be given on insurance.....	2570	451
waiver of right to, on insurance.....	2567	450
fraudulent omission to communicate certain, on insurance,		
effect of.....	2569	450
representing in insurance.....	2578	451
See REPRESENTATION; CONCEALMENT.		
<b>INHERITANCE:</b>		
words of, not necessary to pass a fee.....	1076	221
See SUCCESSION.		
<b>INJUNCTION:</b>		
power of Court to issue, in action by creditor of mortgageor..	2976	508
preventive relief granted by.....	3420	579
provisions concerning.....	3421	579
when allowed.....	3422	579
when not allowed.....	3423	579
See PREVENTIVE RELIEF.		
<b>INJURY:</b>		
right of protection from.....	43	10
right to use force to defend person and property from.....	49	13
tenant for life to do no, to real property.....	813	179
who may sue for, to real property.....	825	180
certain, to realty forbidden, by mining .....	1409	285
threat of, to person, property or character, renders contract		
voidable.....	1569	311
ib.....	1570	312
contract for exemption from liability for, void.....	1668	328
obligation to abstain from.....	1708	335
liability for, caused by neglect.....	1714	336
ib.....	1838	354

	Section.	Page.
<b>INJURY: (Continued.)</b>		
innkeeper, when not liable for, to guest's property.....	1860	356
borrower, when to repair.....	1889	359
hirer, when to repair.....	1929	364
to ship, liabilities of seamen for.....	2063	383
liabilities of inland carrier for.....	2194	399
liabilities of marine carrier for.....	2197	399
<b>INLAND BILL OF EXCHANGE: See BILL OF EXCHANGE.</b>		
<b>INLAND CARRIER: See CARRIER.</b>		
<b>INNKEEPER:</b>		
defined .....	3053	519
liability of, as depositary.....	1859	356
how exempted from liability.....	1860	356
lien of.....	3054	519
lien of, not measured by propriety of supplies.....	3055	519
lien of, when arises.....	3056	520
lien of, extends only to goods which he is bound to receive....	3057	520
lien of, extends to stolen property.....	3058	520
lien of, extends to horses deposited.....	3059	520
boarding-house keeper is.....	3060	520
<b>INSANE PERSONS: See PERSONS OF UNSOUND MIND.</b>		
<b>INSANITY:</b>		
children of marriage annulled on ground of.....	84	23
custody of such .....	85	24
ground for annulling marriage.. ..	83	23
proposal revoked by.....	1587	316
See PERSONS OF UNSOUND MIND.		
<b>INSOLVENCY:</b>		
defined .....	3450	585
of special partnership, claims of special partner on, subordi- nate.....	2491	436
of special partnership, preferential assignments on, forbidden	2496	439
what is equivalent to, of principal in guaranty.....	2802	432
of consignee, what is.....	3077	522
consignor may stop goods in transit on, of consignor.....	3080	523
<b>INSOLVENT:</b>		
debtor, beneficial trust of, passes to assignees of.....	895	190
<b>INSPECTION:</b>		
buyer has right of, of thing sold with warranty.....	1785	347
<b>INSTRUMENTS:</b>		
containing condition wrong <i>per se</i> , void.....	709	163
executing power to be in writing.....	899	191
in execution of power, deemed conveyances.....	910	192
in execution of power, fraud, how affects.....	916	193
affecting title to real property, ownership of.....	994	209
certain non-negotiable written, transferable.....	1459	294
by married woman, void unless acknowledged, how.....	1093	224
by attorney in fact, void unless executed, how.....	1095	225
distinction between sealed and unsealed abolished.....	1096	225
in writing <i>prima facie</i> import consideration.....	1096	225
burden of proof of, showing want of sufficient consideration to support, lies where.....	1097	225
evidencing title declared by judgment, how proved for record	1161	236
what shall not be recorded.....	1162	236
proved by other than subscribing witness, how recorded.....	1163	237



# INDEX.

695

	Section.	Page.
<b>INSTRUMENTS: (Continued.)</b>		
executed under power of attorney, when deemed recorded.....	1164	237
execution of, proof of, how made.....	1183	242
ib.....	1187	243
subsequent recording of prior, void as to subsequent.....	1203	247
when deemed recorded.....	1218	250
recording, execution and acknowledgment of, affecting home- stead .....	1240	253
implied warranty on sale of written, executory.....	1774	346
<b>REAL:</b>		
enumerated .....	1092	323
witnesses not necessary to their validity.....	1098	225
when may be recorded.....	1160	236
effect of execution of, by married woman.....	1181	242
authority of agent to execute executory, to be in writing.....	1732	339
mortgage of real property, for what purpose deemed.....	2942	501
<b>FRAUDULENT:</b>		
when void against purchasers.....	1227	251
when not void against purchasers.....	1228	251
power to revoke, when deemed executed.....	1229	251
ib.....	1230	251
other provisions concerning.....	1231	252
when void against creditors.....	3439	582
may be valid in favor of purchaser.....	3441	583
can be avoided by judgment creditor only.....	3442	583
<b>UNRECORDED:</b>		
valid as between parties and privies thereto.....	1201	247
when void.....	1202	247
purchase from subsequent grantee without notice prior, valid.....	1204	247
holder of recorded instrument presumed in good faith, as against holder of .....	1206	247
actual notice of, by holder of subsequent recorded, evidence of bad faith.....	1207	248
circumstances to rebut that presumption.....	1208	248
void as against encumbrances.....	1209	248
<b>INSULT:</b>		
right of protection from.....	43	11
<b>INSURABLE INTEREST:</b>		
in general, defined.....	2546	447
may consist in what.....	2547	447
carrier or depository has.....	2548	447
mere contingency or expectancy is not.....	2549	447
measure of.....	2550	447
essential to validity of insurance.....	2551	447
must exist at what time.....	2552	448
effect of transfer of.....	2553	448
effect of transfer after loss.....	2554	448
effect of transfer in one of several things.....	2555	448
effect of transfer between joint owners, etc.....	2557	448
effect of change of, by death.....	2556	448
in life or health insurance, who has.....	2763	475
<b>IN MARINE INSURANCE:</b>		
of owner of ship.....	2659	461
of owner of ship covered by bottomry bond.....	2660	461
of owner of ship, in freightage.....	2662	461
of owner of ship, in freightage under charter party.....	2663	462
of owner of ship, in profits.....	2664	462
of owner, under charter party.....	2665	462
<b>INSURANCE:</b>		
defined.....	2527	445
what may be subject to.....	2531	445

	Section.	Page.
<b>INSURANCE: (Continued.)</b>		
usual kinds of.....	2533	445
parties to, defined.....	2538	445
parties to, who may be.....	2539	446
ib.....	2540	446
by mortgagee in favor of mortgagee, effect of.....	2541	446
void if insured has no interest.....	2551	448
when interest must exist.....	2552	448
change of interest suspends.....	2553	448
change of interest after loss does not suspend.....	2554	448
change of interest in thing separately insured does not sus- pend, as to other things.....	2555	448
change of interest by succession does not avoid.....	2556	448
change of interest from one joint owner, etc., to another, does not avoid.....	2557	448
concealment in, defined.....	2561	449
concealment, ground for rescission.....	2562	449
what must be communicated in.....	2563	449
what need not be communicated in.....	2564	450
what is deemed material in.....	2565	450
what parties to, are bound to know.....	2566	450
right to information in, how waived.....	2567	450
what information not necessary to.....	2568	450
fraudulent concealment of facts concerning warranty, avoids parties to, not bound to state matters of opinion.....	2569	450
representation in, oral or written.....	2570	451
representation in, when made.....	2571	451
representation in, when made.....	2572	451
representation in, how interpreted.....	2573	451
representation in, when deemed a promise.....	2574	451
representation in, how affects policy.....	2575	451
representation in, may be withdrawn, when.....	2576	451
representation in, refers to what time.....	2577	451
representation in, upon belief.....	2578	451
representation in, when deemed false.....	2579	452
representation in, false, ground for rescission.....	2580	452
representation in, materiality of, how determined.....	2581	452
policy of, defined.....	2586	452
policy of, must specify what.....	2587	453
policy of, whose interest covered by.....	2588	453
policy of, may provide for avoidance.....	2611	455
policy of, in favor of agent, etc., how expressed.....	2589	453
policy of, in favor of partner, etc., how expressed.....	2590	453
policy of, general description in, to whom applicable.....	2591	453
policy of, may be framed for benefit of successive owners.....	2592	453
policy of, not transferred by transfer of thing insured.....	2593	453
policy of, open, defined.....	2595	454
policy of, valued, defined.....	2596	454
policy of, running, defined.....	2597	454
policy of, effect of receipt in.....	2598	454
policy of, agreement not to transfer claim under, void.....	2599	454
policy of, warranty in, defined.....	2603	455
policy of, form of warranty in.....	2604	455
express warranty must be in policy.....	2605	455
express warranty defined.....	2607	455
warranty may relate to past, present or future.....	2608	455
warranty as to future, defined.....	2608	455
warranty, performance of, when excused.....	2609	455
warranty, breach of, material ground for rescission.....	2610	455
warranty, breach of immaterial, does not avoid.....	2611	455
warranty, breach of, without fraud, effect of.....	2612	456
premium of, when earned.....	2616	456
premium, return of, when due.....	2617	456
premium, return of, when not due.....	2619	456
premium on, when none allowed.....	2618	456

	Section.	Page.
<b>INSURANCE: (Continued.)</b>		
premium on, in case of over-insurance.....	2620	457
premium on, contribution to.....	2621	457
ib.....	2622	457
perils, what covered by.....	2626	457
perils, loss incurred by rescue from, covered by.....	2627	458
perils excepted from.....	2628	458
perils caused by fraud, when not covered by.....	2629	458
notice of loss under, must be given.....	2633	458
notice of defects or delay in, how waived.....	2635	459
proof of loss under, what must be given.....	2634	458
proof of defects or delay in notice of loss, how waived.....	2636	459
proof of loss by certificate, when excused.....	2637	459
double, defined.....	2641	459
double, contribution under.....	2642	459
reinsurance, defined.....	2646	460
reinsurance, what must be communicated on.....	2647	460
reinsurance presumed to be against liability.....	2648	460
reinsurance, original insurer has no interest in.....	2649	460
special partnership not allowed to carry on business of.....	2477	436
of lottery, forbidden.....	2532	445
<b>MARINE:</b>		
defined.....	2655	461
insurable interest under.....	2659	461
insurable interest, owner of ship has.....	2660	461
insurable freightage, when.....	2661	461
expected freightage, when insurable.....	2662	462
insurable interest under charter party, when begins.....	2663	462
insurable interest in profits.....	2664	462
insurable interest of charterer of ship.....	2665	462
what must be communicated in.....	2669	462
what information is material in.....	2670	462
when persons insured by, presumed to have information.....	2671	463
effect of certain concealments upon.....	2672	463
representation wilfully false, avoids.....	2676	463
eventually false, does not avoid.....	2677	463
warranty of seaworthiness implied.....	2681	464
warranty of seaworthiness, when complied with.....	2683	464
meaning of "seaworthy," in respect to insurance.....	2682	464
ib.....	2684	464
warranty of seaworthiness, effect of.....	2684	464
different degrees of seaworthiness, as contemplated by policy of.....	2685	464
ib.....	2686	464
warranty of neutrality, effect of.....	2688	465
voyage covered by, how determined.....	2692	465
ib.....	2693	465
voyage, deviation from, defined.....	2694	465
voyage, deviation from, when proper.....	2696	466
voyage, deviation from, when improper.....	2696	466
voyage, deviation from, effect of.....	2697	466
loss under, total or partial.....	2701	466
ib.....	2702	466
actual or constructive loss under.....	2703	467
actual total loss under.....	2704	467
constructive total loss under.....	2705	467
actual loss, when presumed.....	2706	467
on cargo, etc., when voyage is broken up.....	2707	467
abandonment unnecessary upon actual total loss.....	2709	467
loss of profits, when presumed.....	2740	472
covers expenses of reshipment in certain cases.....	2708	467
of profits, when recoverable.....	2338	412
ib.....	2710	468

	Section.	Page.
<b>INSURANCE: (Continued.)</b>		
free of average, effect of.....	2711	468
against total loss only, effect of.....	2712	468
abandonment under.....		468
measure of indemnity under.....		471
valuation in policy of, when conclusive.....	2736	471
valuation in policy of, when applicable to partial loss.....	2737	471
valuation in policy of, apportioned.....	2739	472
valuation in policy of, of profits.....	2740	472
measure of indemnity under open policy of....	2741	472
measure of indemnity in case of damage.....	2742	472
measure of indemnity where expenses are incurred.....	2743	473
measure of indemnity for general average.....	2744	473
measure of indemnity where insured entitled to contribution..	2745	473
measure of indemnity in case of partial loss of ship, etc.....	2746	473
<b>FIRE:</b>		
effect of concealment or false representation upon.....	2752	474
effect of alteration in thing upon.....	2753	474
ib.....	2754	474
how affected by acts of insured.....	2755	474
measure of indemnity under.....	2756	474
<b>LIFE AND HEALTH:</b>		
when may be payable.....	2762	474
who may be insured by.....	2763	475
may be transferred, etc., to person having no interest.....	2764	475
notice of transfer of, not necessary.....	2765	475
measure of indemnity under.....	2766	475
does not pass to assignee for benefit of creditors.....	2470	590
ship's manager cannot bind owners to.....	2389	426
<b>INSURANCE COMMISSIONER:</b>		
articles of insurance incorporation to be filed with.....	296	66
<b>INSURANCE CORPORATIONS:</b>		
may be formed.....	286	61
articles of incorporation to be submitted to Insurance Com- missioner.....	296	66
to comply with requirements of Title on <i>Insurance Commis- sioner</i> (Political Code).....	413	94
subscription to capital stock.....	414	95
purchases and conveyance of real estate.....	415	95
policies, how issued and by whom signed.....	416	95
dividends, of what, and when declared.....	417	96
Directors liable for loss on, in certain cases.....	418	96
<b>Fire and Marine:</b>		
capital stock.....	423	96
payment of subscription.....	424	97
certificate of, of paid up capital stock to be filed.....	425	97
property which may be insured.....	426	98
funds may be invested, how.....	427	98
rate of risk.....	428	98
amounts to be reserved before making dividends.....	429	98
ib.....	430	99
<b>Mutual Life, Health and Accident:</b>		
capital stock.....	437	99
guarantee fund.....	437	99
of what guarantee fund shall consist.....	438	100
what it constitutes.....	439	100
deficiency in capital stock.....	439	100
declaration of fixed capital to be filed.....	440	101
guarantee notes and interest, how disposed of.....	441	101
insured to be entitled to vote.....	442	102
may invest in what securities.....	443	102
number of Directors may be altered, how.....	444	102

	Section.	Page.
<b>INSURANCE CORPORATIONS: (Continued.)</b>		
limitation to the holding of stock.....	445	103
premiums, how payable.....	446	103
to furnish Insurance Commissioner certain facts.....	447	103
no stamp required on contract of accident insurance.....	448	104
<b>INSURED:</b>		
<b>PERSON:</b>		
defined .....	2538	446
who may be.....	2540	446
must have insurable interest.....	2551	448
effect of change of interest upon rights of.....	2553	448
ib.....	2554	448
ib.....	2555	448
ib.....	2556	448
ib.....	2557	448
ib.....	2559	448
what must be communicated by.....	2563	449
not answerable for truth of information, when.....	2570	451
effect of naming, in policy.....	2588	453
effect of vague description of, in policy .....	2591	453
agreement not to transfer claim of, after loss, void.....	2599	454
statement in policy concerning, is warranty.....	2608	455
entitled to return of premium, when.....	2617	456
ib.....	2619	456
ib.....	2620	457
when not.....	2618	456
wilful act of, not covered by insurance.....	2629	458
must give notice of loss.....	2633	458
what proof must be given by.....	2634	458
may require payment from any insurer when doubly insured..	2642	459
has no interest in reinsurance.....	2649	460
<b>In Marine Insurance:</b>		
presumed to know of loss, when.....	2671	463
effect of false representation by.....	2676	463
entitled to payment without abandonment, when.....	2709	467
may abandon, when.....	2717	469
agents of, are agents of insurer, after abandonment.....	2726	470
not obliged to abandon.....	2732	471
may recover proportion of profits, when.....	2738	472
may recover whole loss from insurer, subrogating him to right		
of contribution.....	2745	473
<b>In Fire Insurance:</b>		
what acts of, do not avoid policy.....	2755	474
<b>THING:</b>		
lottery or lottery prize cannot be.....	2532	445
against, what may be.....	2531	445
effect of change of interest in.....	2553	448
ib.....	2554	448
ib.....	2555	448
ib.....	2556	448
ib.....	2557	448
ib.....	2558	448
transfer of, does not transfer policy.....	2593	453
statement in policy concerning, is warranty.....	2608	455
exposure of, to peril, entitles insurer to premium.....	2618	456
liability of insurer for loss incurred in rescue of.....	2708	467
total loss of, defined.....	2704	467
may be abandoned, when.....	2717	469
belongs to insurer after abandonment.....	2724	470
belongs to insurer after payment for total loss.....	2735	470
valuation of.....	2736	471
in fire insurance, effect of alteration in.....	2753	474
ib.....	2754	474

	Section.	Page.
<b>INSURED: (Continued.)</b>		
in fire insurance, effect of alteration in.....	2755	474
interest in, when must exist.....	2552	448
<b>INSURER:</b>		
defined .....	2538	446
who may be.....	2539	446
effect of assent of, to transfer of insurance to mortgagee.....	2542	446
what must be communicated by .....	2563	449
ib.....	2564	450
ib.....	2647	460
ib.....	2669	462
may rescind for fraudulent concealment.....	2562	449
breach of warranty exonerates, when.....	2612	456
entitled to premium, when.....	2616	456
must return premium, when.....	2617	456
must contribute to return of premium, when.....	2621	457
liable for what losses.....	2626	457
ib.....	2627	458
ib.....	2628	458
ib.....	2629	458
notice of loss must be given to.....	2633	458
notice of loss, what defects in, waived by.....	2635	459
delay, when waived by .....	2636	459
must contribute on double insurance.....	2642	459
reinsurance by.....	2646	460
<b>IN MARINE INSURANCE:</b>		
exonerated by certain concealments.....	2672	463
may rescind for false representation.....	2676	463
not liable for loss after deviation.....	2696	466
liability of, when voyage broken up.....	2707	467
ib.....	2708	467
liability of, for profits.....	2710	468
liability of, for partial loss.....	2711	468
ib.....	2737	471
ib.....	2746	473
abandonment to.....	2716	468
paying as for total loss, entitled to all that remains.....	2725	470
agents of insured act for, after abandonment.....	2726	470
mere silence of, is not acceptance of abandonment.....	2727	470
of ship, what belongs to, after abandonment.....	2730	471
how liable, on refusal to accept abandonment.....	2731	471
liability on loss of profits.....	2740	472
liability on damage of thing insured .....	2742	472
liability for repairs.....	2743	473
liability for contribution by insured.....	2744	473
liability where insured has claim for contribution.....	2745	473
liability for partial loss of ship, etc.....	2746	473
may rescind for fraud in valuation.....	2736	471
<b>IN FIRE INSURANCE:</b>		
may rescind for alteration, when.....	2753	474
<b>IN LIFE INSURANCE:</b>		
notice of transfer, etc., to, unnecessary.....	2765	475
<b>INSURRECTION:</b>		
involuntary deposit may be made in case of.....	1815	350
duty of depositary in such case.....	1816	351
<b>INTEMPERANCE:</b>		
habitual, defined.....	92	25
habitual, ground for divorce.....	107	28
<b>INTENTION:</b>		
to desert, not always co-exist with separation.....	95	25

	Section.	Page.
<b>INTENTION: (Continued.)</b>		
to desert, not to be inferred.....	100	26
to desert, how may be established.....	100	26
of author of power, to be followed in its execution.....	906	192
of grantor, how ascertained in ambiguous grant.....	1069	220
of testator to govern interpretation of will.....	1317	269
ib. ....	1370	277
of testator, how ascertained.....	1318	269
overrules grammatical construction.....	1324	270
overrules technical meaning.....	1327	270
substantial compliance with, sufficient.....	1348	273
to make adoption, must be made in writing.....	1351	273
to extinguish old obligation necessary in novation.....	1531	305
such presumed, when.....	1533	306
to deceive, an essential element of fraud.....	1572	312
of parties to govern interpretation of contract.....	1636	324
of parties, how ascertained.....	1637	324
of parties, when ascertained by the language.....	1638	324
of parties, when ascertained by the writing alone.....	1639	324
of parties to revision of contract so as to conform to.....	3399	576
of parties, how ascertained in revision.....	3401	577
superior to terms of written contract, when.....	1640	324
general terms to be restricted by main.....	1648	325
particular clauses subordinate to general.....	1650	325
words inconsistent with, to be rejected.....	1653	326
presumption of, to destroy or cancel contract.....	1699	332
of trustor, necessary to creation of trust.....	2221	463
fraudulent, a question of fact.....	3443	583
<b>INTEREST:</b>		
<b>IN PROPERTY:</b>		
none, unless specified in the Code.....	701	162
ib. ....	702	162
absolute.....	679	159
qualified.....	680	159
joint.....	683	159
partnership.....	684	160
in common.....	685	160
present.....	689	160
future.....	690	160
future rights of posthumous children in.....	698	161
future, pass by transfer.....	699	161
ib.....	700	162
future, none, unless specified.....	703	163
future, how defeated.....	739	166
ib.....	740	166
future, when not defeated.....	741	166
ib.....	742	166
future vested.....	694	161
future contingent.....	695	161
future contingent, may be alternative.....	696	161
future contingent, not void because improbable.....	697	161
perpetual.....	691	161
limited.....	692	161
mere possibility of, not transferable.....	700	162
when void for suspending alienation.....	716	163
in personal property, how protected.....	947	199
in real property called estate.....	701	162
chattel.....	765	171
what, affected by transfer.....	1083	222
time of creation of.....	749	167
merger of, destroys servitude.....	811	178
in ship, how transferred.....	1135	233
in existing trust, how transferred.....	1136	233

	Section.	Page.
<b>INTEREST : (Continued.)</b>		
certain, in remainder, not affected by death of devisee.....	1344	273
trustee must give beneficiary notice of his acquisition of.....	2233	484
transfer of, when a mortgage.....	2921	497
<b>Of MONEY :</b>		
defined .....	1915	363
in bequest of money, when accrues.....	1366	276
on legacies.....	1369	277
application of payments to.....	1479	297
stopped by offer of performance.....	1504	302
annual rate of.....	1916	362
legal rate of.....	1917	362
ib.....	1918	362
when becomes part of principal.. ..	1919	363
on judgment.....	1920	363
when trustee may be required to pay.....	2237	486
ib.....	2262	499
rate on loan under bottomry.....	3022	515
rate on loan under respondentia.....	3039	517
rate on amount of protested foreign bill.....	3236	546
as damages.....	3237	555
as damages, in actions other than contract.....	3288	555
as damages, limit of rate of, by contract.....	3289	555
acceptance of principal waives.....	3290	555
compound, defined.....	3585	607
<b>INTERPRETATION :</b>		
of the Code .....		602
of words and phrases.....	3555	603
of representation in insurance.....	2572	451
of agreement to indemnify.....	2778	477
of guaranty.....		481
of suretyship.....	2837	487
of negotiable instruments.....		535
maxims of.....		595
<b>Of GRANT :</b>		
how made.....	1065	220
in what consists.....	1066	220
of limitations.....	1067	220
by aid of recitals.....	1068	220
of ambiguous language.....	1069	220
against grantor.....	1070	221
to give consistency to all parts.....	1071	221
of irreconcilable provisions.....	1072	221
of words of description.....	1074	221
of words of inheritance.....	1076	221
<b>Of WILLS :</b>		
according to intention.....	1317	269
to be confined to written will.....	1318	269
rules of, to be observed.....	1319	270
several, to be taken together.....	1320	270
all parts to be considered in.....	1321	270
latter part controls.....	1321	270
distinct clause not affected by indistinct.....	1322	270
in case of ambiguity or doubt.....	1323	270
words to be taken in ordinary sense.....	1324	270
words to receive operative construction.....	1325	270
technical words.....	1327	270
technical words not necessary.....	1328	271
to avoid intestacy.....	1326	270
of devise, etc., of real property, etc.....	1331	271
of devise of residue of real property.....	1332	271
of devise, as referring to time of death.....	1333	271
of devise or bequest to a class.....	1337	271



# INDEX.

703

	Section.	Page.
<b>INTERPRETATION: (Continued.)</b>		
of words of donation and limitation .....	1335	271
of directions for conversion.....	1338	272
by what law governed .....	1377	277
<b>OF OBLIGATIONS:</b>		
general rules for.....	1423	292
of conditions involving forfeiture.....	1442	292
<b>OF CONTRACTS:</b>		
to be uniform.....	1635	323
to effectuate mutual intention.....	1636	324
to ascertain intention.....	1637	324
to be governed by language used.....	1638	324
to be governed by written words.....	1639	324
exception in cases of fraud.....	1640	324
entire contract to be considered in.....	1641	324
several contracts to be taken together in.....	1642	324
to be favorable to its validity.....	1643	325
according to ordinary sense of words.....	1644	325
technical words in.....	1645	325
what law governs .....	1646	325
by surrounding circumstances.....	1647	325
subject matter to be considered in.....	1647	325
to be restrained by its object.....	1648	325
uncertainty in, to be construed against whom.....	1649	325
ib. ....	1654	326
general intent to prevail in.....	1650	325
original and written parts in, to prevail.....	1651	326
repugnances in.....	1652	326
inconsistent words to be rejected in .....	1653	326
what stipulations implied in.....	1655	326
incidents to contract implied in.....	1656	326
in respect to time of performance.....	1657	327
time, when deemed essential in.....	1658	327
See DEFINITIONS.		
<b>INTERPRETER:</b>		
may be employed in taking acknowledgments.....	1182	242
<b>INTESTATE:</b>		
property of, how applied to payment of debts.....	1353	275
property of, how distributed.....	1385	279
ib.....	1386	279
if illegitimate child dies, mother is successor.....	1388	282
See SUCCESSION.		
<b>INUNDATION:</b>		
voluntary deposit may be made in case of .....	1815	350
duty of depositary in such case.....	1816	351
<b>INVENTOR:</b>		
rights of.....	980	208
rights of subsequent.....	984	208
See PRODUCT OF THE MIND.		
<b>INVENTORY:</b>		
of separate property of wife.....	171	39
effect of filing such.....	172	39
non-entry of property therein evidence of what.....	173	39
specific legatee must make and deliver.....	1365	276
assignor for benefit of creditors must make.....	3461	588
ib.....	3462	588
<b>INVESTMENT:</b>		
of trust money, by trustee.....	2261	408

	Section.	Page.
<b>INVOLUNTARY DEPOSIT: See Deposit.</b>		
<b>ISLANDS:</b>		
ownership of, newly formed in navigable stream.....	1016	213
ownership of, newly formed in unnavigable stream.....	1017	213
<b>ISSUE:</b>		
death without, defined.....	1075	227
<b>J</b>		
<b>JETTISON:</b>		
defined.....	2148	393
in what order made.....	2149	393
by whom made.....	2150	393
loss by, how borne.....	2151	393
loss by, called general average loss.....	2152	393
loss of cargo stowed on deck.....	2154	394
application of rules concerning.....	2155	394
See GENERAL AVERAGE.		
<b>JOINT:</b>		
ownership may be.....	683	159
interest, defined.....	683	159
obligation may be.....	1428	290
obligation, contribution between parties to.....	1429	290
and several, obligation may be.....	1427	290
and several, contribution of parties to.....	1429	290
and several, contract, when presumed to be.....	1659	327
debtors, effect of performance by one of several.....	1474	296
debtors, effect of release of one of several.....	1543	307
creditors, effect of performance to one of several.....	1475	296
creditors, effect of directions by one of several.....	1476	296
owners, delivery of deposit to, how made.....	1827	352
service, how performed after death of joint employe.....	1991	373
interest, change in, does not affect insurance.....	2557	448
drawees, presentment to.....	3187	540
<b>JUDGE:</b>		
order of, for adoption.....	227	48
of Probate Court, may consent to apprenticeship of child when	265	54
of Court of record, may take acknowledgments, etc.....	1172	239
duty of, where execution issues against homestead.....	1242	254
may order deposit of \$5,000 out of proceeds of homestead sale	1243	254
See COUNTY JUDGE; DISTRICT JUDGE; COURT.		
<b>JUDGMENT:</b>		
may be obtained affirming validity of marriage.....	76	21
children of marriage to be annulled, to be specified in.....	84	23
effect of, annulling marriage.....	86	24
against corporations, how satisfied.....	388	90
attornment to stranger by virtue of, valid.....	1128	233
instruments evidencing title declared by, how acknowledged		
for record.....	1161	236
interest on.....	1920	363
of dissolution of partnership, partner entitled to.....	2452	432
recovery of, by creditor against surety, effect of.....	2939	487
against indemnitee, when conclusive against indemnitor.....	2778	477
lien.....	3067	521
of rescission.....	3406	577
of cancellation.....	3412	578
<b>JUDICIAL SALE:</b>		
implied warranty on.....	1777	347
pledgee may foreclose right of redemption by.....	3011	513

	Section.	Page.
<b>JUSTICE OF THE PEACE:</b>		
may give consent to apprenticing child, when.....	265	54
may order meetings of corporations, when.....	310	70
may take proof or acknowledgment of instruments, in what limits.....	1170	239
<b>K</b>		
<b>KEEPING: See DEPOSIT FOR KEEPING.</b>		
<b>KNOWLEDGE:</b>		
necessary to validity of ratification.....	3314	415
of principal not necessary to create guaranty.....	2788	479
<b>L</b>		
<b>LAND:</b>		
State, and appurtenances thereto, when granted to corporation	366	86
ib.....	367	86
ib.....	368	86
when such reverts to the State.....	370	86
is real property.....	658	156
defined.....	659	156
limitation on leases of agricultural.....	717	163
burdens and servitudes on.....	801	176
ib.....	802	176
right of flooding, an easement.....	801	176
See REAL PROPERTY.		
<b>LAND AND BUILDING CORPORATIONS:</b>		
may be formed.....	286	61
how organized.....	639	147
may borrow money.....	640	147
powers and object of.....	641	148
may insure the lives of members and debtors.....	642	148
may own what real estate.....	643	148
by-laws may provide, what.....	644	148
annual report.....	645	149
liability of shareholders for debts.....	646	149
consolidation and transfer of business.....	647	150
minors and married women may hold stock.....	648	150
<b>LANDLORD:</b>		
relation of, how terminated at will.....	788	174
when may re-enter on property.....	790	174
when may collect double rent.....	791	175
ib.....	792	175
grant by, valid without attornment by tenant.....	1126	232
attornment to stranger void, without consent of.....	1128	233
must repair, when.....	1941	365
tenant may repair at expense of, when.....	1942	366
acceptance of rent by, renews lease.....	1945	366
tenant must inform, of adverse proceedings in.....	1948	367
must not let room in parts.....	949	367
See INNKEEPER.		
<b>LAPSE OF TIME:</b>		
defined.....	125	32
in action for divorce, establishes certain presumptions.....	125	32

	Section.	Page.
<b>LAPSE OF TIME: (Continued.)</b>		
presumptions arising from, may be rebutted.....	128	32
insufficient to bar action in divorce to be affirmatively stated in complaint.....	131	34
proposal to contract, when revoked by.....	1587	316
partnership dissolved by.....	2450	432
does not extinguish lien.....	2911	496
extinguishes bottomry lien.....	3027	516
does not legalize nuisance.....	3490	592
<b>LAW:</b>		
defined .....	3	2
Common, the rule of decision in Courts of this State.....	5	2
of nations, part of Common Law.....	6	3
domestic or municipal, part of Common Law.....	6	3
no Common Law where law is declared by the Code.....	7	3
governing personal property.....	946	199
performance excused if prevented by.....	1511	362
mistake of, defined.....	1578	315
mistake of foreign, is mistake of fact.....	1579	316
interpretation of will to be governed by, what.....	1877	277
interpretation of contract to be governed by, what.....	1646	325
certain things implied in contract from.....	1655	326
ib.....	1656	326
advantage of, when may be waived.....	3513	595
does not interpose between those equally in the right or equally in the wrong.....	3524	597
gives preference to the vigilant.....	3527	598
respects form less than substance.....	3528	598
never requires impossibilities.....	3531	598
neither does nor requires idle acts.....	3532	599
disregards trifles.....	3533	598
<b>LAWFUL:</b>		
object of contract must be.....	1596	317
consideration of contract must be.....	1607	319
contract to be interpreted so as to make it.....	1643	325
<b>LEASE:</b>		
of agricultural lands, limitation of.....	717	163
of town or city lots, limitation of.....	718	163
for life, rent, how recovered on.....	823	180
power may be granted to owner for life to make certain.....	924	195
construction of certain powers to.....	925	195
power to owner for life to make, not transferable.....	926	195
such may be released.....	927	196
mortgages, by party having power to.....	928	196
for term of more than one year, a real instrument.....	1092	223
for term of more than one year, witness not necessary to validity.....	1098	224
tenant not liable for breach of condition of, without notice of grant.....	1126	233
<b>LEGACY:</b>		
gift, when treated as.....	1153	235
specific.....	1357	274
demonstrative.....	1357	274
annuity.....	1357	274
residuary.....	1357	274
general.....	1357	274
property, how applied to payment of.....	1359	275
how applied to payment of debts.....	1360	275
to kindred, etc., chargeable only after others.....	1361	276
abatement of.....	1362	276

	Section.	Page.
<b>LEGACY: (Continued.)</b>		
specific, title passes by.....	1363	276
possession of, how obtained.....	1363	276
ib.....	1365	276
for life, inventory to be given.....	1365	276
of income, when accrues.....	1366	276
may be satisfied.....	1367	276
when due.....	1368	277
interest on.....	1369	277
<b>LEGATEE:</b>		
death of, before testator, nullifies such testamentary dispo- sition.....	1343	272
for life must make inventory, etc.....	1365	276
liability of, for testator's debts.....	1378	278
<b>LEGISLATION:</b>		
cannot be restrained by injunction.....	3423	579
<b>LEGISLATURE:</b>		
may examine affairs of corporation.....	383	89
<b>LEGITIMACY:</b>		
of children of annulled marriage.....	84	23
of children of divorced marriage.....	1387	287
ib.....	145	36
ib.....	146	36
presumption of.....	193	43
of children born out of wedlock.....	194	43
who may dispute.....	195	43
<b>LENDER:</b>		
rights of, under bottomry.....	3023	515
ib.....	3025	515
<b>For Use:</b>		
retains title to thing lent.....	1885	359
entitled to increase of thing lent.....	1885	359
consent of, necessary to loan by borrower.....	1891	359
must indemnify borrower, when.....	1893	360
ib.....	1894	360
may require return of loan at any time.....	1894	360
<b>For Exchange:</b>		
cannot require borrower to return thing lent before time agreed upon.....	1905	361
<b>Of Money:</b>		
entitled to what interest.....	1916	362
ib.....	1917	362
ib.....	1918	362
See LOAN.		
<b>LESSEE:</b>		
of real property, rights of, as against assigns of lessor.....	822	179
See HIRER.		
<b>LETTER:</b>		
upon hire must secure quiet possession to hirer.....	1927	364
remedies of, against hirer misusing property.....	1930	364
may terminate hiring, when.....	1931	364
<b>Of REAL PROPERTY:</b>		
must put it in proper condition, when.....	1941	365
must repair it, when.....	1941	365
liable to hirer for certain expenditures.....	1942	366
acceptance of rent by, renews lease, when.....	1945	366
tenant must inform, of adverse proceedings.....	1948	367

	Section.	Page.
<b>LETTER: (Continued.)</b>		
<b>OF PERSONAL PROPERTY:</b>		
must deliver it to hirer.....	1955	368
must secure hirer in quiet enjoyment.....	1955	368
must put it in proper condition.....	1955	368
must repair it, when.....	1955	368
must bear extraordinary expenses, when.....	1956	368
liable to hirer for certain expenditures.....	1958	368
See <b>HIRING</b> .		
<b>LETTER OF CREDIT:</b>		
defined.....	2858	489
may be addressed to whom.....	2859	489
writer of, liable to whom.....	2860	489
writer of, liable without notice, when.....	2865	490
writer of, liable only for credit duly given.....	2866	490
general, defined.....	2862	490
general, any person may give credit under.....	2863	490
general, several persons may give credit under.....	2863	490
special, defined.....	2861	489
when deemed continuing guaranty.....	2864	490
credit given must agree with terms of.....	2866	490
See <b>GUARANTY; SURETY</b> .		
<b>LETTERS:</b>		
ownership of private.....	985	309
<b>LETTERS PATENT:</b>		
may be recorded without further proof or acknowledgment...	1159	236
effect of recording.....	1159	236
<b>LETTERS TESTAMENTARY:</b>		
who entitled to.....	1371	277
executor not to act till he has obtained.....	1373	277
<b>LIABILITY:</b>		
of minors and persons of unsound mind, for wrong.....	35	10
extent of such.....	36	10
on other than Code Covenants depends on what.....	1119	231
of persons acquiring property of decedent.....	1127	232
of factor to principal.....	2029	378
factor cannot relieve himself from.....	2030	378
of shipmaster on abandonment of ship.....	2041	380
of depositary, for damage arising from wrongful use of deposit.	1835	353
of depositary, for damage arising from negligence.....	1840	354
of innkeepers.....	1859	356
innkeepers, when excused from.....	1860	356
of finder of lost property.....	1866	357
carrier may terminate his, how.....	2121	389
of inland carrier for loss, etc.....	2194	399
of marine carrier for loss, etc.....	2197	399
ib. ....	2198	399
of trustee mingling trust funds.....	2236	405
of trustee, for breach of trust.....	2237	406
ib. ....	2238	406
of partners.....	2443	431
ib. ....	2443	431
of one held out as partner.....	2444	431
ib. ....	2445	431
indemnity against.....	2778	479
of guarantors.....		483
<b>LIBEL:</b>		
defamation effected by.....	44	11

# INDEX.

709

	Section.	Page.
<b>LIBEL: (Continued.)</b>		
defined .....	45	11
See PRIVILEGED PUBLICATION.		
<b>LICENSE:</b>		
marriage.....	69	19
marriage, original to be filed with County Recorder.....	74	20
copy of marriage, may be given to parties.....	74	20
of ships provided by Act of Congress.....	966	201
See MARRIAGE.		
<b>LIEN:</b>		
defined.....	2372	491
certain, included in term "encumbrances." .....	1114	230
homestead liable for certain.....	1239	253
seaman not to lose his, by agreement.....	2052	381
accessory to some obligation.....	2909	496
general, defined.....	2874	492
special, defined.....	2875	492
right of holder of, in certain case.....	2876	492
what contracts are subject to law of .....	2877	492
how created.....	2881	492
by operation of law does not exist until performance due.....	2882	492
may be created upon future interest.....	2883	493
may be created as security for future obligation.....	2884	493
cannot transfer title.....	2888	493
does not imply any personal obligation.....	2890	493
confined to original obligation.....	2891	493
does not limit creditor's right to enforce obligation secured		
thereby.....	2892	494
holder of, not entitled to compensation for trouble .....	2893	494
holder of, may pledge its subject to extent of lien .....	2990	510
priority of, according to creation.....	2897	494
priority of mortgage over other.....	2898	494
priority of, order of resort in case of.....	2899	494
redemption from, who has right of.....	2903	495
redemption from, when inferior lienor has right of.....	2904	495
redemption from, how made.....	2905	495
redemption from, cannot be restrained.....	2889	493
extinguished, how.....	2910	496
extinguished by sale or conversion of subject.....	2910	496
not extinguished by lapse of time.....	2911	496
not extinguished by partial performance of obligation.....	2912	496
extinguished by restoration of subject to owner.....	2913	496
of seller of real property.....	3046	518
of seller, how waived.....	3047	518
of seller, against whom valid.....	3048	518
of seller of personal property .....	3049	518
of buyer of real property.....	3050	518
for services on personal property.....	3051	519
of manufacturer, repairer, etc., of personal property.....	3052	519
of innkeeper.....	3054	519
extent of, of innkeeper .....	3055	519
of innkeeper, how arises.....	3056	520
of innkeeper, extends to stolen property.....	3058	520
of innkeeper, extends to horses brought by guest.....	3059	520
boarding-house keeper has.....	3060	520
of factor.....	3061	520
of banker.....	3062	521
of shipmaster.....	3063	521
of carrier for freightage.....	2144	392
of carrier for fare.....	2190	398
of mates and seamen.....	3064	521
of sheriffs and similar officers.....	3065	521

	Section.	Page.
<b>LIEN: (Continued.)</b>		
of attorney.....	3066	531
of judgment.....	3067	531
of mechanic.....	3068	531
upon ships for debts.....	3069	532
enforcement of.....	3070	532
stoppage in transit as mode of enforcement.....	3076	532
does not revoke prior will.....	1301	266
for freightage, ship's manager cannot give up.....	2389	425
of partner upon partnership property.....	2405	437
on what mortgage is.....	2928	498
mortgage on property adversely held has precedence over what	2929	498
of pledge is dependent on possession.....	2988	510
damages for conversion of property subject to.....	3338	585
debt may be preferred in assignment for benefit of creditors...	3453	585
See BOTTOMRY; MORTGAGE; PLEDGE; RESPONDENTIA;		
STOPPAGE IN TRANSIT.		
<b>LIENOR:</b>		
can have no title to subject of lien.....	2886	493
cannot hold property for other claims.....	2891	493
may collect debt without enforcing lien.....	2892	494
not entitled to compensation for trouble, etc..	2893	494
must resort to funds, in what order.....	2899	494
inferior, may redeem.....	2904	495
inferior, may be subrogated, when.....	2904	495
conversion of property by, extinguishes lien.....	2910	495
restoration of property to owner by, effect of.....	2913	496
may pledge to extent of lien.....	2990	510
See MORTGAGE; PLEDGE.		
<b>LIFE INSURANCE:</b> See INSURANCE.		
<b>LIGHTS:</b>		
to be kept on shipping.....	Note.	204
<b>LIMITATION:</b>		
of claim of aliens to inherited property.....	672	158
of leases of certain real property.....	717	163
ib.....	718	164
of successive estates for life.....	774	172
clear and distinct in grant, not controlled by other words..	1086	220
words of, in will.....	1235	271
<b>LIMITATION OF ACTIONS:</b>		
of action for divorce.....	124	31
ib.....	127	33
to recover stock sold at delinquent sale.....	347	81
against Directors for indebtedness of corporations. ....	327	78
<b>LINEAL WARRANTS:</b>		
abolished.....	1127	223
<b>LIQUIDATED DAMAGES:</b>		
when contract may fix, for breach.....	1671	328
<b>LIQUIDATION:</b>		
of partnership, partner must act in best faith in.....	2411	427
of partnership, who may act in.....	2459	435
of partnership, who may not act in.....	2460	435
of partnership, powers of partners in.....	2461	435
of partnership, what partner may do in.....	2462	435
See PARTNERSHIP.		



	Section.	Page.
<b>LITERARY CORPORATIONS:</b>		
may be formed.....	286	61
See CORPORATIONS.		
<b>LOAN:</b>		
<b>FOR USE:</b>		
defined .....	1884	359
does not transfer title.....	1885	359
borrower under, must use what care .....	1886	359
ib. ....	1887	359
ib. ....	1888	359
borrower, when to repair injuries.....	1889	359
borrower, how must use thing lent.....	1890	359
borrower, must not re-lend.....	1891	359
borrower, when to bear expense.....	1892	360
borrower, duties of, on termination of.....	1896	360
lender under, liable for defects.....	1893	360
lender may require return of thing lent.....	1894	360
lender, when may terminate.....	1895	360
<b>FOR EXCHANGE:</b>		
defined .....	1902	361
ib. ....	1903	361
transfers title.....	1904	361
contract of, cannot be modified by lender.....	1905	361
certain provisions apply to.....	1906	361
<b>OF MONEY:</b>		
defined .....	1912	362
to be repaid in current money.....	1913	362
may be for reward.....	1914	362
reward for, called interest.....	1915	362
annual rate of interest.....	1916	362
legal interest for.....	1917	362
ib. ....	1918	362
interest, when becomes part of.....	1919	363
interest on judgment.....	1920	363
<b>UNDER BOTTOMRY:</b>		
defined .....	3017	514
rights of lender of.....	3023	515
rate of interest on.....	3022	515
when, becomes due.....	3026	516
<b>LODGINGS:</b>		
for what term presumed to be hired.....	1944	366
rent of, when payable.....	1947	367
innkeeper's lien for, furnished guest.....	3054	519
See INNKEEPER.		
<b>LOSS:</b>		
occasioned by collision of ships, how apportioned.....	973	203
of thing deposited, obligations of depositary thereon.....	1838	354
innkeeper, when not liable for, of guest's property.....	1860	356
employer must indemnify employé for, caused by negligence of former .....	1971	374
by jettison, how borne.....	2151	393
ib. ....	2152	393
liability of inland carrier for.....	2194	399
liability of marine carrier for.....	2197	399
in partnership, share of partners in.....	2403	426
in partnership, agreement for division of, when implied.....	2404	427
partner to be indemnified for certain.....	2412	428
insurer liable, for what.....	2626	457
insurer liable when incurred in rescue from peril.....	2627	458
insurer liable when caused by negligence.....	2629	458
insurer not liable for, when caused by peril not insured against.....	2628	458

	Section.	Page.
<b>LOSS:</b> ( <i>Continued.</i> )		
insurer not liable when caused by fraud of insured.....	2629	458
notice of, must be given.....	2633	458
defects in notice, how waived.....	2635	459
delay in notice of, how waived.....	2636	459
<b>UNDER MARINE INSURANCE:</b>		
may be total or partial.....	2701	466
when partial.....	2702	466
total, may be actual or constructive.....	2703	467
total actual, defined.....	2704	467
total constructive, defined.....	2705	467
actual, when presumed.....	2706	467
notice of abandonment not necessary on.....	2709	467
insurance confined to, does not cover constructive loss.....	2712	468
of profits, not recoverable without abandonment of goods.....	2710	468
free of average, defined.....	2711	468
how estimated under open policy.....	2741	472
effect of total, on contract of bottomry.....	3025	515
See INSURANCE.		
<b>LOTTERY:</b>		
insuring prohibited.....	2532	445
<b>LUGGAGE:</b>		
defined.....	2181	397
common carrier of persons must carry, when.....	2180	397
common carrier of persons, how must carry.....	2181	397
liability of common carrier for.....	2182	397
common carrier must deliver, where.....	2183	397
common carrier has lien upon, for fare.....	2190	398
<b>LUNATICS:</b> See PERSONS OF UNSOUND MIND.		
<b>M</b>		
<b>MAIL:</b>		
notice of dishonor may be given by.....	3144	533
notice of dishonor to be sent by, when.....	3148	534
notice of dishonor excused when there is no.....	3155	535
<b>MALES:</b>		
under twenty-one are minors.....	17	7
of eighteen and upwards capable of marrying.....	56	16
<b>MALICE:</b>		
in libel and slander ( <i>see Note to Sec. 44, p. 11</i> ). interest, as damages, may be given in case of.....	3288	555
exemplary damages allowed in case of.....	3394	556
<b>MANUFACTURE:</b>		
agreement to, not required to be in writing.....	1740	341
implied warranty on sale of.....	1769	345
ib.....	1770	345
<b>MANUFACTURING CORPORATIONS:</b>		
may be formed.....	286	61
See CORPORATIONS.		
<b>MARINE CARRIER:</b> See CARRIER.		
<b>MARINE INSURANCE:</b> See INSURANCE.		
<b>MARKS:</b>		
implied warranty of genuineness of, on goods sold.....	1773	346

	Section.	Page.
<b>MARRIAGE:</b>		
status of minors changed to that of adults by solemnization of	20	8
defined—what constitutes .....	55	16
who are capable of consummating.....	56	16
proof of, how made.....	57	17
when void from incapacity to contract.....	58	18
when void from fraud or force.....	58	18
incestuous.....	59	18
between whites and negroes, etc., void.....	60	18
subsequent, when void.....	61	18
pardon for felony does not restore rights of.....	62	18
promise of, subject to same rules as other contracts.....	63	19
damages for breach of promise of.....	3329	564
contracted without the State.....	64	19
executory contract of, must be in writing.....	1624	321
how solemnized .....	68	19
license.....	69	19
by whom solemnized.....	70	20
no particular form for solemnization of.....	71	20
substantial requisites for solemnization of.....	72	20
certificate of.....	73	20
certificate of, to parties and County Recorder.....	74	20
declaration of, how made .....	75	21
action to affirm unsolemnized.....	76	21
husband not liable for debts of wife contracted before.....	176	40
when may be annulled.....	82	22
action to annul, when and by whom commenced.....	83	23
children of annulled.....	84	23
custody of children of annulled.....	85	24
effect of judgment of nullity of.....	86	24
dissolution of.....	90	24
legitimacy of issue after dissolution of.....	194	43
releases from parental authority.....	204	44
of ward, supersedes guardian.....	254	52
restraint upon, when void.....	710	163
ib.....	1676	330
effect of, upon will made previous.....	1297	265
ib.....	1298	266
ib.....	1299	267
See HUSBAND AND WIFE; NULLITY; DIVORCE.		
<b>MARRIAGE SETTLEMENTS:</b>		
how executed.....	184	41
to be acknowledged and recorded.....	185	41
effect of recording or non-recording.....	186	41
minor may make.....	187	42
real instruments.....	1092	223
witness not necessary to validity of.....	1098	225
<b>MARRIED WOMAN:</b>		
as sole trader.....	188	42
may become corporators, officers and members of certain corporations.....	285	60
shares of stock of, how transferred.....	325	75
dividends payable to.....	325	75
may hold stock in homestead corporations.....	561	130
may hold stock in savings and loan corporations.....	575	135
may hold stock in land and building corporations.....	648	150
may execute power, when.....	897	190
ib.....	898	191
may create estate by virtue of vested power.....	914	193
general and beneficial powers to.....	917	193
grant by, void, unless acknowledged, how.....	1093	224
power of attorney of, void, unless acknowledged, how.....	1094	225

	Section.	Page.
<b>MARRIED WOMAN: (Continued.)</b>		
acknowledgment by, to instrument.....	1179	241
acknowledgment by, form of certificate of.....	1180	241
effect of conveyance by.....	1181	242
may dispose of separate property by will.....	1272	261
See WIFE.		
<b>MARSHALLING ASSETS:</b>		
order of.....	2599	494
ib.....	3433	582
<b>MASCULINE GENDER:</b>		
words used in, include the feminine.....	3582	607
<b>MASONIC FRATERNITY:</b>		
may hold what amount of real estate .....	506	139
<b>MASTER AND SERVANT:</b>		
mutual right of protection between.....	48	13
ib.....	49	13
contract of apprenticeship between.....	264	55
relation of, in general.....	2009	376
renewal of relation between.....	2012	376
relation between, how may be terminated.....	2016	377
See EMPLOYER; EMPLOYÉ; SERVANT; SERVICE.		
<b>MATE:</b>		
power of master of ship over.....	2037	379
defined.....	2048	381
how engaged and discharged.....	2050	381
if vessel is unseaworthy, may refuse to serve on.....	2051	381
when wages, etc., of, begin.....	2055	382
wrongfully discharged, may recover for his wages .....	2057	382
disabled on voyage, entitled to his wages.....	2062	383
cannot ship goods on his own account.....	2064	383
embezzlement or injuries by.....	2065	383
<b>MATERIALITY:</b>		
of representation in insurance, how determined.....	2581	462
of concealment in insurance, how determined.....	2565	450
<b>MATERIALS:</b>		
ownership of personal property by uniting, of several owners.....	1030	215
ownership of thing formed by one out of, of another.....	1028	214
ownership of thing formed by uniting inseparable.....	1029	214
agreement to manufacture, where manufacturer owns.....	1740	341
<b>MATURITY:</b>		
Court may decree payment of debt before, when.....	2976	508
apparent, defined.....	3132	531
apparent, of bill payable at sight .....	3134	531
apparent, of promissory note payable at sight.....	3135	531
<b>MAXIMS:</b>		
of jurisprudence.....		595
<b>MAYOR:</b>		
may take acknowledgment and proof of instruments.....	1170	238
<b>MEASURE:</b>		
of insurable interest in property.....	2547	447
of indemnity under marine insurance.....	2736	471
of indemnity under fire insurance.....	2756	474
of indemnity under life and health insurance.....	2764	475

	Section.	Page.
<b>MEASURE OF DAMAGES:</b> See DAMAGES.		
<b>MECHANICS' LIEN:</b> where regulated.....	3068	521
<b>MEETINGS:</b> See CORPORATIONS.		
<b>MEMBERS:</b> See CORPORATIONS.		
<b>MEMORANDUM:</b> on contract for sale of personal property..... on contract for sale of real property..... of auctioneer, binding on parties..... of auctioneer to contain, what.....	1739 1741 1798 1798	340 34 349 349
<b>MENACE:</b> defined..... will procured by, void..... consent to contract obtained through, voidable..... ib..... See DURESS; UNDUE INFLUENCE.	1570 1272 1567 1689	312 261 311 331
<b>MERCHANDISE:</b> implied warranty as to quality of..... ib..... ib.....	1768 1769 1771	345 345 345
<b>MERGER:</b> of interests, when destroys servitude..... of interests, when destroys hiring..... of declarations of trust.....	811 1933 2254	178 365 407
<b>MESSAGES, CARRIER OF:</b> See CARRIER.		
<b>MINES:</b> property in, is real property..... persons working, not to injure improvements on land..... persons working, to give bonds not to commit injuries to im- provements..... persons may work, after crops thereon have been harvested... partnership in..... meeting to levy assessments on, how called..... notice to copartners in, how served..... assessment on, how levied..... shares in, forfeited on failure to pay assessment..... sales of delinquent shares in, how and when made..... limit to assessments on..... additional assessments on, when may be levied.....	662 1409 1410 1410 2516 2517 2518 2519 2519 2520 2521 2521	157 285 286 286 442 442 442 443 443 443 444 444
<b>MINORS:</b> who are..... periods of minority, how calculated..... status of, how changed to that of adults..... by laws of other State or country, how deemed in this State.. custody of..... cannot give a delegation of power..... may hold certain offices..... contracts may be made by, subject to disaffirmance..... when may disaffirm..... cannot disaffirm contract for necessities..... cannot disaffirm certain obligations..... liable for wrongs..... not liable for exemplary damages..... how may enforce their rights.....	17 18 20 23 25 26 27 28 29 30 31 35 36 37	7 7 8 8 8 8 8 8 9 9 9 10 10 10

	Section.	Page.
<b>MINORS: (Continued.)</b>		
when capable of consummating marriage.....	58	16
wife entitled to earnings of, living with her, apart from husband.....	175	40
capable of contracting marriage, may make marriage settlement.....	187	42
may apprentice themselves, how.....	264	54
shares of stock of, may be represented at meeting of corporation.....	312	71
property of, how may be acquired by corporations.....	373	87
may hold stock in homestead corporations.....	561	130
may hold stock in savings and loan corporations.....	575	135
may hold stock in land and building corporations.....	648	150
when his wages may be paid to him.....	212	46
restraints upon marriage of, allowed.....	710	163
ib.....	1676	330
allowance out of fund may be made for support of.....	726	165
may contract, to what extent.....	1557	310
See CHILD.		
<b>MISREPRESENTATION:</b>		
by depositary, when renders him liable.....	1838	354
trustee must not benefit by.....	2228	404
partner must not benefit by.....	2411	427
fraudulent, by debtor, as to value of pledge, effect of.....	2999	511
contract obtained through, cannot be specifically enforced.....	3391	575
See DECEIT; FRAUD; REPRESENTATION.		
<b>MISTAKE:</b>		
in will, how corrected.....	1340	272
consent to contract given by, voidable.....	1567	311
may be of fact or of law.....	1576	314
of fact, defined.....	1577	314
of law, defined.....	1578	315
of foreign law, is mistake of fact.....	1579	315
in written contract, to be disregarded.....	1640	324
agreement for compensation does not take away right to rescind for, when.....	1690	331
thing obtained through, must be restored, when.....	1712	335
ib.....	1713	335
thing gained by, held in trust.....	2224	404
<b>MIXTURE:</b>		
of trust fund by trustee, effect of.....	2236	405
ownership of things formed by.....	1025	214
ib.....	1029	214
ib.....	1030	215
<b>MONEY:</b>		
performance in respect to, called payment.....	1478	297
offer to pay, how to be made.....	1506	291
exchange of, by what rules governed.....	1864	349
implied warranty on exchange of.....	1867	350
investment of trust, by trustee.....	2261	406
negotiable instrument must be made payable in.....	3038	524
interest of (see INTEREST OF MONEY).		
loan of (see LOAN).		
<b>MONUMENTS:</b>		
coterminous owners bound to maintain.....	841	181
<b>MORAL OBLIGATION:</b>		
how far a good consideration.....	1606	318

	Section.	Page.
<b>MORALS:</b>		
contract contrary to good, unlawful.....	1667	328
<b>MORTGAGE:</b>		
power of sale in, when deemed part of security.....	894	190
by party having power to lease.....	928	195
effect of such.....	929	195
homestead liable for certain.....	1239	253
factor cannot, property of principal.....	2368	422
<b>MORTGAGE IN GENERAL:</b>		
defined.....	2919	497
nature of lien of.....	2920	497
priority of lien for price.....	2898	494
transfer as security, deemed a.....	2921	497
bottomry and respondentia not governed by law of.....	2922	498
absolute transfer may be shown to be, when.....	2923	498
what may be subject to.....	2921	497
property in adverse possession subject to.....	2925	498
power of sale may be given by.....	2926	498
power of sale under, is a trust.....	2927	498
a lien upon what.....	2928	498
on property adversely held, effect of.....	2929	498
does not entitle mortgagee to possession.....	2930	499
may be foreclosed.....	2931	499
person bound by, may not impair security.....	2932	499
<b>REAL:</b>		
defined.....	2936	499
how created.....	2937	500
form of.....	2938	500
not a personal obligation.....	2939	500
who must satisfy, after succession or devise.....	2940	501
how acknowledged and recorded.....	2941	501
presumed to be acquired in good faith.....	2944	501
title acquired subsequent to, inures to mortgagee.....	2945	501
what must be recorded as.....	2946	502
recording assignment of.....	2947	502
how discharged.....	2948	502
ib.....	2949	502
ib.....	2950	502
penalty for not acknowledging satisfaction of.....	2951	503
<b>PERSONAL:</b>		
defined.....	2956	504
property subject to.....	2957	504
growing crops, etc., subject to.....	2958	504
how created.....	2959	504
power of attorney to execute.....	2960	504
form of.....	2961	504
must be authenticated.....	2962	505
must be recorded.....	2963	505
certain provisions applicable to recording.....	2964	506
time allowed for recording.....	2967	506
of property in transit, where recorded.....	2967	506
of property of common carrier, where recorded.....	2968	506
property, when exempt from operation of.....	2969	506
ib.....	2970	507
ib.....	2971	507
recording of, is notice to whom.....	2972	507
when void against creditors, etc.....	2973	507
how satisfied.....	2974	507
mortgagee may foreclose.....	2975	508
remedy of creditor of mortgageor under.....	2976	508
remedy of creditor of mortgagee under.....	2977	508
provisions concerning, do not apply to ships.....	2978	508

	Section.	Page.
<b>MORTGAGEE:</b>		
power of sale to, when deemed part of security.....	894	190
when entitled to execution of power.....	929	195
when included in the term " purchaser for value ".....	1200	246
insurance by mortgageor for benefit of.....	2541	446
insurance, effect of mortgageor's action.....	2542	446
may be vested with power of sale.....	2926	498
not entitled to possession of property.....	2930	499
may acquire possession by new agreement.....	2930	499
may foreclose right of redemption, how.....	2931	499
security of, not to be impaired by person whose interest is sub- ject to lien.....	2932	499
subsequently acquired title inures to.....	2945	501
how may discharge mortgage.....	2948	502
ib.....	2949	502
penalty for not acknowledging satisfaction of.....	2951	503
time allowed for travel to Recorder's office.....	2966	506
property in transit from possession of personal property mort- gaged.....	2970	507
of personal property may foreclose right of redemption.....	2975	508
of personal property, remedy of creditors of.....	2977	508
See MORTGAGE.		
<b>MORTGAGEOR:</b>		
insurance by, payable to mortgagee.....	2541	446
effect of acts of, on insurance for benefit of mortgagee.....	2542	446
property held adversely to, may be mortgaged.....	2925	498
may agree to change of possession.....	2930	499
right of, to redeem may be foreclosed.....	2931	499
of real property not personally bound by mortgage.....	2939	500
heir of, must satisfy mortgage.....	2940	501
title subsequently acquired by, inures to mortgagee.....	2945	501
remedy of, in case mortgagee refuses acknowledgment of sat- isfaction.....	2951	503
of personal property, effect of his removing thing mortgaged.....	2970	507
personal mortgage, when void against creditors of.....	2971	507
ib.....	2973	507
right of, of personal property, to redeem may be foreclosed....	2975	508
remedy of creditors of.....	2976	508
See MORTGAGE.		
<b>MOTHER:</b>		
of illegitimate unmarried minor is entitled to his custody.....	200	44
father cannot transfer custody of child without written con- sent of.....	197	43
See PARENT AND CHILD.		
illegitimate child cannot be adopted without consent of.....	224	47
consent of, when necessary to apprenticeship of child.....	265	64
of illegitimate child succeeds to his property.....	1388	262
<b>MUNICIPAL CORPORATIONS:</b> See CORPORATIONS.		
<b>MUNIMENTS:</b>		
Sheriff's grant and encumbrances are, of same title.....	1210	248
<b>MUTUALITY:</b>		
of fraud.....	1565	311
defined .....	1580	316
of intention, contract to be interpreted so as to give.....	1636	324



	Section.	Page.
<b>N</b>		
<b>NAME :</b>		
of witnesses to marriage to be indorsed on certificate.....	73	20
of corporations to be stated in articles of incorporation.....	290	64
error in articles of incorporation concerning, does not invalidate.....	359	83
notice of change of partnership, is sufficient notice of dissolution.....	2454	433
fictitious, when may be used.....	2466	434
ib.....	2467	434
certificate of change of partnership, to be filed and published	2469	435
County Clerk to keep register of partnership.....	2470	435
See FICTITIOUS.		
<b>NAVIGATION :</b>		
domestic.....	962	201
foreign.....	962	201
rules of.....	970	203
rules of, prescribed by the U. S. Board of Inspectors.....	Note	204
collision from breach of rules of.....	971	203
ib.....	972	203
See COLLISION.		
<b>NECESSARIES :</b>		
minors and persons of unsound mind cannot disaffirm contract for.....	30	9
neglect of husband to provide, for wife, ground for divorce...	106	27
furnished to child, when parent liable for.....	207	45
furnished to child, when parent not liable for.....	208	45
<b>NEGLIGENCE :</b>		
degrees of.....	3559	603
slight.....	3560	603
ordinary.....	3560	603
gross.....	3560	603
wilful.....	106	27
private rights may be lost by.....	9	3
wilful, of husband to provide for wife, ground for divorce.....	92	25
wilful, ground for annulling indentures of apprenticeship.....	276	56
liability for.....	1714	302
liability of depositary for.....	1838	354
ib.....	1840	354
liability of innkeeper for.....	1859	356
borrower to repair injuries caused by his.....	1889	359
hirer to repair injuries caused by his.....	1929	364
employer must indemnify employé for loss caused by former's responsibility of employé for.....	1971	370
carrier cannot exonerate himself from anticipated liability to be caused by future.....	1990	373
person claiming under ostensible authority must be free from of agent, principal responsible for, when.....	2174	396
shipmaster, when responsible for, of employés.....	2334	418
shipmaster, when responsible for, of pilot.....	2337	419
insurer, when liable for loss through.....	2383	424
	2384	424
	2629	458
<b>NEGOTIABLE INSTRUMENT :</b>		
defined.....	3087	524
must be for unconditional payment of money.....	3088	524
payee of, must be ascertainable, when.....	3089	524
may be in alternative.....	3090	524
date of.....	3091	524
may contain pledge.....	3092	524

	Section.	Page.
<b>NEGOTIABLE INSTRUMENT: (Continued.)</b>		
must not contain other contract .....	3093	525
may bear any date.....	3094	525
different species of.....	3095	525
interpretation of, as to time of payment.....	3099	525
interpretation of, as to place of payment.....	3100	525
interpretation of, when payable to order.....	3101	525
interpretation of, when payable to fictitious person.....	3103	526
interpretation of, when issued unindorsed.....	3102	526
when and for what presumed to be made.....	3104	526
indorsement of, defined.....	3108	527
indorsement of, how to be made .....	3109	527
indorsement of, may be made on separate paper, when.....	3110	527
indorsement of, general, defined.....	3112	527
indorsement of, general, how made special.....	3114	527
indorsement of, special, defined.....	3113	527
indorsement of, special, how may destroy negotiability.....	3115	527
indorsement of, implied warranty of.....	3116	527
indorsement of, before delivery to payee, effect of.....	3117	528
indorsement of, without recourse, effect of.....	3118	528
ib.....	3119	528
indorsement of, gives privity to contract.....	3120	528
indorsement of, party making has rights of guarantor.....	3121	528
indorsement of, for accommodation, rights of party making... ..	3122	529
indorsement of, without consideration, when binding.....	3123	529
indorsement of, in due course, defined.....	3124	529
indorsement of, in due course, rights conferred by.....	3125	529
indorsement of, in due course, of instrument in blank.....	3126	530
blanks in, may be filled up, when.....	3126	530
presentment of, for payment, not necessary to charge principal	3130	530
presentment of, how made.....	3131	530
apparent maturity of, defined.....	3132	531
surrender of, or proof of loss, etc., may be required on pay- ment of.....	3137	532
dishonor of, defined.....	3141	533
notice of dishonor, by whom given.....	3142	533
form of dishonor.....	3143	533
notice of dishonor, how served.....	3144	533
notice of dishonor, how served after death of party notified...	3146	533
notice of dishonor, given in ignorance of death, valid.....	3146	534
notice of dishonor, at what time given.....	3147	534
notice of dishonor, when to be mailed.....	3148	534
notice of dishonor, agent need only give principal.....	3149	534
notice of dishonor, time allowed party receiving to give.....	3150	534
notice of dishonor, takes effect, in whose favor.....	3151	535
notice of dishonor, when excused.....	3153	535
presentment and notice of dishonor of, when excused.....	3156	535
ib.....	3157	535
presentment and notice of dishonor of, delay in, when excused	3158	536
presentment and notice of dishonor of, how waived.....	3159	536
how extinguished.....	3164	536
how revived after extinction.....	3165	537
implied warranty on sale of.....	1774	546
duties of agent employed to collect.....	2021	577
See BANK NOTES; BILL OF EXCHANGE; CERTIFICATE OF DEPOSIT; CHECKS; PROMISSORY NOTES.		
<b>NEUTRAL PAPERS:</b>		
implied warranty of, in marine insurance.....	2688	445
<b>NEWSPAPERS: See PUBLICATION.</b>		
<b>NOMINAL CONDITIONS:</b>		
in direction for execution of power, may be disregarded.....	905	192

# INDEX.

721

	Section.	Page.
<b>NOMINAL DAMAGES:</b>		
when allowed.....	3360	569
<b>NON-RESIDENT:</b>		
stock of, how transferred.....	326	75
debtor beneficial trust for, passes to assignees .....	895	190
alien, inheriting, when must claim inheritance.....	672	168
<b>NORTHERLY:</b>		
defined.....	1074	238
<b>NOTARY PUBLIC:</b>		
may take acknowledgment or proof in the State.....	1170	238
may take acknowledgment or proof out of the State.....	1171	239
may take acknowledgment or proof out of the United States.....	1172	239
offer of performance must be made to, when.....	1488	299
negotiable instrument must be presented to, when.....	3131	530
bill of exchange payable at office of, when.....	3176	538
bill of exchange must be presented to, when.....	3186	539
bill of exchange protested by, when.....	3226	545
protest, how made by.....	3227	545
making protest, may give notice thereof.....	3231	545
<b>NOTE: See PROMISSORY NOTE; NEGOTIABLE INSTRUMENT.</b>		
<b>NOTICE:</b>		
actual, defined.....	3565	604
constructive, defined.....	3566	604
filing inventory of wife's property gives, of title.....	172	39
to be given to stockholders of meeting to continue existence of corporation .....	287	63
ib. ....	405	93
of meeting of corporation.....	302	68
of assessment of stock.....	335	77
of delinquent assessment .....	337	78
ib.....	338	79
ib.....	339	79
to tenant at will to quit, how given.....	789	174
effect of such.....	790	174
by tenant.....	791	175
of intention to re-enter, when and how given.....	793	175
not necessary before action.....	795	175
rights of purchaser for value without.....	856	184
ib.....	869	186
payment of rent to grantor before, of grant, binding on grantee .....	1126	232
record of instruments forbidden to be recorded does not impart .....	1162	236
unrecorded instrument valid as regards parties with.....	1201	247
when vendee under purchase from subsequent vendor takes without, of prior instrument.....	1204	247
when vendee under purchase from subsequent vendor takes with, of.....	1205	247
actual, when evidence of bad faith.....	1207	248
certain instruments not to be avoided against purchaser with.....	1228	261
of selection of one of several alternatives to be given.....	1449	293
of selection of place of delivery to be given.....	1756	343
of adverse claim to deposit, to be given to depositor.....	1825	352
depository must give, of deposit to real owner.....	1826	352
depository must give, of sale of deposit in danger of perish- ing .....	1837	353
duty of gratuitous depository ceases upon.....	1847	354
finder must give, of thing found.....	1865	357
innkeeper exempted from liability by giving certain.....	1860	356

	Section.	Page.
<b>NOTICE: (Continued.)</b>		
hiring terminated by what.....	1934	365
tenant must give landlord, of adverse proceeding.....	1948	367
hirer of real property may repair after .....	1942	366
hirer of personal property may repair after .....	1957	366
certain, terminates employment.....	1996	374
ib.....	1999	374
of arrival of freight, to be given to consignee, when.....	2120	389
of storage of freight, to be given to consignee, when.....	2121	389
trustee must give beneficiary, of acquisition of adverse in- terests .....	2233	405
to principal or agent, when deemed to the other.....	2332	418
of renunciation of partnership, relieves partner from liability personal, of dissolution of partnership, when necessary.....	2417	428
by change of name sufficient.....	2453	433
of dissolution of special partnership.....	2454	433
to copartners in mines, how served.....	2509	441
ib.....	2517	442
what must be given before selling delinquent shares in mines. of loss under insurance, must be given.....	2518	442
of loss under insurance, defects in, how waived.....	2520	443
of loss under insurance, delay in, how waived.....	2633	466
abandonment of ship to insurer made by.....	2635	459
requisites of such.....	2636	459
of transfer of life insurance policy, not necessary, when.....	2721	469
of principal's default, guarantor not entitled to.....	2722	470
to writer of letter of credit, when necessary.....	2765	476
recording assignment of mortgage operates as.....	2808	483
certain, to be given before sale of pledged property.....	2866	490
ib.....	2972	507
of sale of pledged property may be waived.....	3000	511
to carrier or depositary necessary to stoppage in transit.....	3002	511
of dishonor, to be given to indorser.....	3003	512
of dishonor, by whom to be given.....	3079	523
of dishonor, form of.....	3116	527
of dishonor, how to be served.....	3142	533
of dishonor, how served after death of indorser, etc.....	3143	533
of dishonor, at what time to be given.....	3144	533
of dishonor, when to be mailed.....	3145	533
of dishonor by agent, need only be given to principal.....	3147	534
of dishonor by party charged with, time allowed for.....	3148	534
of dishonor, inures to benefit of other parties.....	3149	534
of dishonor, when excused.....	3150	534
ib.....	3151	534
ib.....	3155	535
ib.....	3156	535
of dishonor, delay in, when excused.....	3157	535
of dishonor, may be waived.....	3220	544
of dishonor, acceptor for honor entitled to.....	3158	536
of dishonor, acceptance for honor does not excuse.....	3169	536
of probable extent of damages, effect of.....	3206	542
of intention to quit, damages for holding over after.....	3207	543
to quit, damages for holding over after.....	3302	558
before abatement of nuisance, when necessary.....	3344	566
	3345	566
	3503	594
<b>NOVATION:</b>		
defined .....	1530	305
how made.....	1531	305
consideration for, presumed.....	1532	306
intent presumed.....	1533	306
completed, how operates.....	1534	306
a contract.....	1535	306
rescission of.....	1536	306

	Section.	Page.
<b>NUISANCE:</b>		
defined .....	3479	591
nothing authorized by statute to be deemed .....	3482	592
liability of successive owners of .....	3483	592
abatement of, does not prejudice claim for damages .....	3484	592
<b>PUBLIC:</b>		
defined .....	3480	592
not legalized by lapse of time .....	3490	592
remedies against .....	3491	592
indictment against, how regulated .....	3492	593
when private person may sue upon .....	3493	593
may be abated, by whom and how .....	3494	593
ib. ....	3495	593
<b>PRIVATE:</b>		
defined .....	3481	592
remedies against .....	3501	593
may be abated, by whom and how .....	3502	594
only upon notice, when .....	3503	594
<b>NULLITY OF MARRIAGE:</b>		
cases where marriages may be annulled .....	82	22
action to obtain decree of, when and by whom commenced .....	83	23
children of annulled marriages .....	84	23
ib. ....	85	24
effect of judgment of .....	86	24
See DIVORCE.		
<b>NUNCUPATIVE WILL:</b>		
how, executed .....	1287	263
requisites to make valid .....	1288	263
proof of .....	1289	264
probate of .....	1290	264
need not be in writing .....	1276	261
See WILL.		
<b>OATH:</b>		
defined .....	3588	607
person solemnizing marriage may administer .....	72	20
of officer of corporation, on filing articles of incorporation .....	294	66
acknowledgment may be taken on, of credible witness .....	1174	240
officer taking proof of instruments may administer .....	1190	244
See AFFIDAVIT.		
<b>OBEDIENCE:</b>		
due from employé to employer .....	1981	371
due from factor to principal .....	2027	378
due from carrier .....	2115	388
due from trustee .....	2258	408
<b>OBJECT OF CONTRACT:</b>		
defined .....	1595	317
must be lawful, possible and ascertainable .....	1596	317
when deemed possible .....	1597	317
when illegality of, renders contract wholly void .....	1598	317
when illegality of, renders contract partly void .....	1599	318
<b>OBJECTIONS:</b>		
to offer of performance, when to be made .....	1501	301
<b>OBLIGATION:</b>		
minor cannot disaffirm certain .....	31	6
defined .....	1418	289
how arise .....	1419	289

	Section.	Page.
<b>OBLIGATION: (Continued.)</b>		
rules for interpretation of.....	1423	290
kinds of.....	1427	290
when joint.....	1428	290
contribution between joint parties to.....	1429	290
when conditional.....	1434	291
conditional, species of.....	1435	291
conditional, what must be done before enforcing.....	1439	292
conditional, when performance of, excused.....	1440	292
conditional, when conditions of, void.....	1441	292
conditional, involving forfeiture, how interpreted.....	1442	292
subject of ownership.....	655	155
how far, good consideration.....	1606	318
implied warranty on sale of written executory.....	1774	346
not implied from creation of lien.....	2891	493
secured by lien, may be otherwise enforced.....	2892	494
specific performance of.....		572
transfer of burden of.....	1457	293
transfer of right of.....	1458	294
alternative, who has right of selection.....	1448	292
alternative, right of selection, how lost.....	1449	293
alternative, indivisible.....	1450	293
alternative, effect of nullity of one or more.....	1451	293
general rules for interpreting.....	1423	290
<b>Extinction of:</b>		
by performance (see PERFORMANCE).		
by offer of performance (see OFFER OF PERFORMANCE).		
by prevention of performance (see PREVENTION OF PERFORMANCE).		
by accord (see ACCORD).		
by novation (see NOVATION).		
by release (see RELEASE).		
by rescission (see RESCISSION).		
created by contract (see CONTRACT).		
<b>IMPOSED BY LAW:</b>		
to abstain from injury.....	1708	335
to compensate for deceit.....	1709	335
to restore thing wrongfully acquired.....	1712	336
to restore thing upon demand.....	1713	336
to restore thing without demand.....	1714	336
to compensate for negligence.....	1714	336
See AGENCY; CARRIAGE; DEPOSIT; EXCHANGE; HIRING; GUARANTY; INDEMNITY; INSURANCE; LIEN; LOAN; NEGOTIABLE INSTRUMENT; PARTNERSHIP; SERVICE.		
<b>OCCUPANCY:</b>		
title by.....	1006	211
<b>OCCUPANT:</b>		
may maintain action to enforce easement.....	610	177
<b>OCCUPATION: See POSSESSION.</b>		
<b>ODD FELLOWS' ASSOCIATION:</b>		
may hold how much real estate.....	596	139
See CORPORATIONS.		
<b>OFFER:</b>		
to contract, acceptance of, how made.....	1582	315
to contract, what is deemed.....	1584	316
to contract, must be absolute.....	1585	316
to contract, may be revoked, when.....	1586	316
to contract, how revoked.....	1587	316
of guaranty, not binding.....	2795	481

	Section.	Page.
<b>OFFER OF PERFORMANCE:</b>		
passes title to personal property under executory agreement		
of sale.....	1141	234
extinguishes obligations.....	1485	298
extinguishes obligations for payment of money, when.....	1500	301
partial, has no effect.....	1486	299
by whom made.....	1487	299
to whom made.....	1488	299
where may be made.....	1489	299
when must be made.....	1490	299
ib. ....	1491	299
with compensation for delay.....	1492	299
to be made in good faith.....	1493	300
must be unconditional..	1494	300
must be unconditional, except as to certain cases.....	1498	300
party making, must be able to perform.....	1495	300
receipt may be required upon.....	1499	300
objections to mode of, when waived.....	1501	301
thing offered need not be produced.....	1496	300
thing offered to be kept separate.....	1497	301
thing offered, title to, vests in creditor .....	1502	301
thing offered, how to be kept by debtor.....	1503	302
effect of, on accessories of obligation.....	1504	302
what excuses.....	1511	302
effect of refusal to accept performance made before.....	1515	303
lien may be redeemed by .....	2905	495
party making, must be able and willing.....	1495	300
ability and willingness, when equivalent to .....	3130	530
of concurrent conditions, when necessary.....	1439	292
of concurrent conditions, when excused.....	1440	292
by any person exonerates surety.....	2839	487
<b>OFFICE:</b>		
what, minors may hold, and what may not.....	27	8
lawful exercise of, not to be restrained by injunction.....	3423	579
<b>OFFICER:</b>		
town, may bind out child to apprenticeship.....	269	55
lien of.....	3065	521
not to be restrained by injunction from exercising his lawful		
functions.....	3423	579
what, may take proof and acknowledgment of instruments.....	1169	238
ib.....	1170	238
ib.....	1171	239
ib.....	1172	239
taking proof or acknowledgment, must indorse certificate.....	1175	240
ib.....	1176	240
taking proof or acknowledgment, attorney in fact must exhibit		
what, to .....	1177	240
taking proof or acknowledgment, must affix seal and signature		
taking proof or acknowledgment, form of certificate of.....	1191	244
ib.....	1176	240
ib.....	1178	241
ib.....	1180	241
taking proof or acknowledgment, may employ interpreter.....	1182	242
taking proof of execution, must have proof of identity of wit-		
ness.....	1184	242
taking proof of execution, evidence must prove what, to.....	1188	244
taking proof of execution, authorized to do certain things....	1190	244
<b>Of CORPORATIONS:</b>		
by-laws to regulate compensation and duties of.....	305	69
Directors to elect President, Treasurer and Secretary.....	308	70
proceedings for removal of.....	309	70
liability of, making false certificate, etc.....	316	73
married women may become.....	285	60

	Section.	Page.
<b>OFFICER :</b> ( <i>Continued.</i> )		
oath of, on filing articles of incorporation.....	294	66
election to fill vacancies.....	316	73
<b>OPERATIVE :</b>		
contract to be interpreted so as to make it.....	1643	324
will to be interpreted so as to make it.....	1325	270
<b>OPINION :</b>		
information as to matters of, need not be given on insurance.	2570	451
<b>OPPRESSION :</b>		
avoids contract, when.....	1567	311
ib.....	1569	312
exemplary damages allowed in case of.....	3294	556
interest as damages allowed in case of.....	3293	555
<b>OPTION :</b>		
of owner in confusion of goods, as to the value or thing itself.	1632	215
as to place of offering performance, debtor has.....	1489	299
as to delivery, notice of exercise of, must be given.....	1756	343
how waived.....	1756	343
of beneficiary in case of breach of trust by trustee.....	2237	466
of payee, as to class of payment of negotiable instrument....	3090	524
<b>ORAL :</b>		
transfer may be, when.....	1051	217
what contracts may be.....	1622	321
negotiations superseded by writing.....	1625	322
contract in writing, may be altered by.....	1693	332
representation in insurance may be.....	2571	451
will may be.....	1276	261
declarations of auctioneer cannot modify written conditions of sale.....	1795	343
<b>ORPHANS :</b>		
corporations may be formed for maintaining asylums for sup- port, etc., of.....	286	61
in asylums, may be apprenticed, how.....	265	54
<b>OSTENSIBLE AGENCY :</b> See AGENCY.		
<b>OSTENSIBLE AUTHORITY :</b> See AUTHORITY.		
<b>OVER-INSURANCE :</b>		
return of premium on, how made.....	2670	456
return of premium on, effected by simultaneous policies.....	2621	457
return of premium on, by successive policies.....	2622	457
See INSURANCE.		
<b>OWNER :</b>		
who may be.....	671	153
all property has.....	669	157
of what the State is.....	670	157
aliens inheriting, when must claim as.....	672	153
rights of.....	732	165
of thing, owns its products.....	732	165
of future estate may use easement, when.....	803	177
of dominant tenement, may enforce easement.....	809	177
of servient tenement, may recover land subject to easement...	810	177
joint, defined.....	683	159
in common, defined.....	686	160
in partnership, defined.....	684	160
of ship, controversy between, how determined.....	965	201



	Section.	Page.
<b>OWNER: (Continued.)</b>		
delivery of deposit to joint, how made.....	1827	352
in real property, rights of, in water.....	817	178
in real property, rights of, as to boundaries.....	830	180
ib.....	831	181
in real property, rights of, entitled to everything beneath or above it.....	829	180
in real property, rights of, to lateral and subjacent support...	832	181
in real property, rights of, to trees.....	833	181
of life estate, how may use it.....	818	179
duties of.....	840	181
of estate for years or at will, rights of.....	819	179
ib.....	820	179
mutual obligations of coterminous.....	841	181
rights of coterminous to support.....	832	181
remedies of, for injury done to inheritance.....	825	180
for life, estate of, when changed into a fee.....	918	193
for life, empowered to make lease, cannot re-transfer power ...	926	195
for life, may release such power.....	927	195
for life or years, effect of conveyance by, in excess of his estate	1124	232
thing obtained without consent of, to be restored.....	1712	336
depository to give notice to real, of thing deposited.....	1826	352
finder of lost property to give notice to.....	1865	357
of property found, may exonerate himself from claim of finder	1871	358
effect of insurance by part.....	2590	453
of ship (see SHIP OWNER).		
<b>OWNERSHIP:</b>		
defined.....	654	155
what may be the subject of.....	655	155
wild animals, when the subject of.....	656	155
modification of.....	678	159
absolute, defined.....	679	159
qualified, defined.....	680	159
several, defined.....	681	159
joint, defined.....	683	159
in partnership, defined. ...	684	160
in common, defined.....	686	160
ib.....	685	160
of thing formed by uniting materials.....	1029	214
conditions of.....	707	162
disposition of income during suspension of.....	733	165
termination of.....	739	166
right to actual possession creates legal.....	848	182
of product of the mind.....	980	208
ib.....	981	208
of trade marks and signs.....	991	209
of good will of business.....	992	209
of title deeds.....	994	209
of fixtures.....	1013	212
of alluvion.....	1014	212
of thing formed by uniting property of several owners.....	1025	214
ib.....	1030	215
of thing formed by one with materials of another.....	1028	214
finder of lost property may require proof of.....	1866	357
covenant of, a General Code.....	1105	227
covenant of, defined.....	1112	229
covenant of, a personal covenant.....	1116	231
covenant of, damages for breach of.....	1118	231
ib.....	3308	559
See PROPERTY; INTERESTS; ESTATES.		

	Section.	Page.
<b>P</b>		
<b>PAPER :</b>		
defined .....	3569	605
<b>PARDON:</b>		
does not restore marital rights.....	62	18
<b>PARENT:</b>		
protected from abduction of child.....	46	13
may dispute legitimacy of child.....	195	43
obligation of, as to support, etc., of child.....	196	43
allowance to, for support of child.....	201	44
has no control over property of child.....	202	44
remedy for abuse by.....	203	44
when authority of ceases.....	204	44
remedy where, dies without providing for support of child....	205	44
when liable for necessities furnished child.....	207	45
when not liable for necessities furnished child.....	208	45
may relinquish services and custody of child.....	211	45
right of, to determine residence of child.....	213	46
when may bring action for exclusive control of child.....	199	44
when neither, has superior right to control of child.....	198	43
abandoning child, presumptively relinquishes control of it...	211	45
consent of both necessary to adoption of child.....	224	47
appointment of guardian by .....	241	50
consent of, when necessary to apprenticeship of child.....	265	54
<b>PARENT AND CHILD:</b>		
marriage between, forbidden.....	59	18
legitimacy of relationship, between.....	193	43
ib.....	194	43
reciprocal duties of, as regards maintenance .....	206	45
not liable for each other's acts.....	214	46
contract of either avoided by menace or duress of the other...	1569	312
ib.....	1570	312
<b>PARTIAL PERFORMANCE:</b>		
effect of.....	1477	297
offer of, void.....	1486	299
when extinguishes obligation..	1524	304
makes oral contract of sale valid, when.....	1741	341
effect on guarantor of principal's accepting.....	2822	482
does not extinguish lien.....	2912	496
<b>PARTIES:</b>		
consent of, necessary to marriage .....	55	16
to marriage, who may be .....	56	16
to marriage, who may not be.....	59	18
situation of, may be considered in construing ambiguous		
grant.....	1069	220
to contract, who may be.....	1556	310
to contract, when minors, etc., may be.....	1557	310
to contract, must be capable of identification.....	1558	310
to loan, may agree to any rate of interest.....	1918	363
to loan, may agree to compound interest.....	1919	363
<b>PARTNER:</b>		
what .....	2395	426
part owner in ship or not .....	2396	426
can be admitted only by unanimous consent.....	2397	426
interest of, in partnership property.....	2402	426
interest of, in profits and losses.....	2403	426
ib.....	2404	427

# INDEX

729

	Section.	Page.
<b>PARTNER : (Continued.)</b>		
may require partnership property to be applied to payment of debts.....	2405	427
lien of, on partnership property.....	2405	427
relation of, confidential.....	2410	427
is a trustee.....	2410	427
must act in best faith.....	2411	427
must not take advantage of copartners.....	2411	427
must account to the firm.....	2412	428
entitled to compensation for expenses.....	2412	428
not entitled to compensation for services.....	2413	428
may renounce partnership, how.....	2417	428
effect of renunciation by.....	2418	428
who liable as.....	2444	431
ib.....	2445	431
<b>GENERAL :</b>		
authority of.....	2428	429
ib.....	2430	430
majority may bind minority.....	2428	429
authority of, as agent for the firm.....	2429	429
what authority, has not.....	2430	430
authority of, confined to acts in good faith.....	2431	430
authority of, in liquidation.....	2458	433
profits made by, belong to firm, when.....	2435	430
must not engage in separate business, when.....	2436	430
may engage in separate business, when.....	2437	431
must account to firm for profits.....	2438	431
liability of joint.....	2442	431
liability of joint, for acts of copartner.....	2443	431
liability of joint, for acts of one held out as.....	2444	431
liability of joint, continues after dissolution, when.....	2453	433
may dissolve partnership.....	2449	432
partial dissolution of partnership by.....	2451	432
entitled to judgment of dissolution, when.....	2452	432
notice of withdrawal of, when sufficient to dissolve.....	2454	433
may act in liquidation, when.....	2459	433
ib.....	2460	434
how may act in liquidation.....	2462	434
change of interest of, does not avoid insurance.....	2557	448
effect of insurance by one of several.....	2590	453
<b>SPECIAL :</b>		
authority of.....	2489	438
may investigate and advise.....	2490	438
may lend to, and recover from firm.....	2491	438
claim of, on firm is subordinate.....	2491	438
not necessary party to actions by or against firm.....	2492	438
must not withdraw capital.....	2493	439
must restore capital withdrawn.....	2494	439
may receive interests and profits.....	2494	439
liability of contribution of.....	2501	439
liability of, for unintentional act.....	2502	440
new, how admitted.....	2508	441
name of, when not used.....	2510	441
<b>MINING :</b>		
must notify other partners of intention to call for levy of assessment.....	2517	442
notices to, how served.....	2518	442
effect of, failing to pay assessment.....	2519	443
<b>PARTNERSHIP :</b>		
interest, what.....	684	160
partners may agree not to carry on same business in county after dissolution.....	1675	329

	Section.	Page.
<b>PARTNERSHIP: (Continued.)</b>		
defined .....	2395	426
joint use of ship does not create .....	2396	426
formation of .....	2397	426
property, defined .....	2401	426
property, partners' interest in .....	2402	426
property to be applied to partnership debts .....	2405	427
property, what is presumed to be .....	2406	427
property, power of partner over in liquidation .....	2461	434
profits and losses, how divided .....	2403	426
when agreement for division of losses implied .....	2404	427
obligations of parties to .....	2410	427
parties to, must act in good faith .....	2411	427
parties to, to account .....	2412	426
parties to, to serve without compensation .....	2413	426
renunciation of .....	2417	426
effect of renunciation of .....	2418	426
<b>GENERAL:</b>		
defined .....	2424	429
bound by a decision of the majority .....	2428	429
each partner agent for .....	2429	429
authority of partners in .....	2430	430
acts in bad faith do not bind .....	2431	430
profits of partners belong to .....	2435	430
partner in, may not engage in certain business .....	2436	431
partner in, may engage in, what .....	2437	431
partner in, must account for certain profits .....	2438	431
partner in, liability of, to third persons .....	2442	431
partner in, liability of one held out as .....	2444	431
partner in, who liable as .....	2445	431
duration of .....	2449	432
total dissolution of .....	2450	432
partial dissolution of .....	2451	432
partner entitled to dissolution of .....	2452	432
notice of termination of .....	2453	432
notice of change of name of .....	2454	432
partners' powers after dissolution .....	2458	433
liquidation of, who may act in .....	2459	433
liquidation of, who may not act in .....	2460	434
liquidation of, powers of partners acting in .....	2461	434
ib .....	2462	434
use of fictitious name in .....	2466	434
name of foreign .....	2467	434
name of foreign, how may be continued .....	2468	435
certificates of use of foreign name to be filed .....	2469	435
ib .....	2470	435
ib .....	2471	435
<b>SPECIAL:</b>		
how formed .....	2477	436
of what to consist .....	2478	436
certificate of, must be made .....	2479	436
certificate of, must be acknowledged and recorded .....	2480	437
liability of partners in making false certificate .....	2481	437
affidavit as to sums contributed to .....	2481	437
requisites for forming .....	2482	437
certificate to be published .....	2483	437
affidavit of publication of certificate to be filed .....	2484	437
renewal of .....	2485	438
who may transact business of .....	2489	438
special partner in, may investigate and advise .....	2490	438
special partner may lend to and recover from .....	2491	438
special partner must not withdraw capital from .....	2493	439
ib .....	2496	439
special partner may receive profits from .....	2494	439

# INDEX.

731

	Section.	Page.
<b>PARTNERSHIP: (Continued.)</b>		
general partners may sue and be sued alone.....	2492	438
transfer of, with intent to prefer creditors, void.....	2496	439
liability of general partner in.....	2500	439
liability of special partner in.....	2501	439
liability of special partner for unintentional act.....	2502	440
who may question existence of.....	2503	440
how made general.....	2507	440
how new special partners may be admitted to.....	2508	441
dissolution of.....	2509	441
name of special partner in, not to be used, when.....	2510	441
<b>MINING:</b>		
how formed.....	2516	442
additional statement in certificate of formation of.....	2516	442
meeting to levy assessment on, how called.....	2517	442
notices to members of, how served.....	2518	442
proof of service of notice to members of, how made.....	2518	442
assessment of, what and how levied.....	2519	443
assessment of, when to be paid and effect of neglecting to pay	2519	443
sales of delinquent shares in, on what notice and by whom		
made.....	2520	443
deed at such sale proof of what.....	2520	444
limit of assessment of.....	2521	444
additional assessment of, how made.....	2521	444
<b>PASSENGER:</b>		
power of shipmaster over.....	2038	379
carrier to afford reasonable accommodation for.....	2103	387
ib.....	2180	397
ib.....	2184	397
carrier must carry luggage of.....	2180	397
carrier liable for luggage of.....	2182	397
carrier must deliver luggage of.....	2183	397
carrier has lien on luggage of.....	2190	398
entitled to a seat.....	2185	398
when fare may be demanded from.....	2187	398
may be ejected for non-payment of fare.....	487	115
ib.....	2188	398
if ejected, fare cannot be collected from.....	2189	398
accepting a ticket, assents to the obligation therein.....	2176	396
damages for carrier's refusing to receive.....	3325	563
See CARRIER OF PERSONS.		
<b>PASTURE:</b>		
right of, may be held as an easement.....	801	176
<b>PAWNBROKER: See PLEDGE; PLEDGER; PLEDGER HOLDER.</b>		
<b>PAYEE:</b>		
under negotiable instrument must be ascertainable.....	3089	524
negotiable instrument, when payable to fictitious.....	3103	526
option of, as to payment.....	3089	524
indorser, when liable to.....	3117	528
<b>PAYMENT:</b>		
defined.....	1478	297
application of general.....	1479	297
pecuniary obligation, how extinguished by offer of.....	1500	301
effect of offer of, on accessory of obligation.....	1505	302
of less than liquidated debt, effect of.....	1524	304
to agent, when sufficient.....	2335	418
when necessary to claim on indemnity.....	2778	477
of negotiable instrument, may be made to whom.....	3164	536
payee's option as to class of.....	3090	524

	Section.	Page.
<b>PAYMENT: (Continued.)</b>		
for honor, may be made, when.....	3203	542
for honor, how may be made.....	3205	542
for honor, must be accepted .....	3204	542
for honor, how made in case of foreign bill.....	3233	546
time and place of.....	3099	525
ib.....	3100	525
See PERFORMANCE; OFFER OF PERFORMANCE.		
<b>PENAL BONDS:</b>		
valid, except as to penal clauses.....	1669	328
<b>PENAL DAMAGES:</b>		
for failure to quit, after notice .....	3344	566
for wilful holding over by tenant.....	3345	566
for forcible exclusion from possession of real property.....	3346	566
for injuries to trees, etc.....	3347	566
for injuries inflicted in a duel.....	3348	566
ib.....	3349	567
See DAMAGES.		
<b>PENAL LAW:</b>		
specific relief not granted, to enforce.....	3369	570
<b>PENALTY:</b>		
imposed by contract, void.....	1669	328
surety not liable beyond.....	2836	487
specific relief not granted to enforce.....	3369	570
contract with, may be specifically enforced.....	3389	574
<b>PERFORMANCE:</b>		
of power, may be enforced.....	932	196
grantee entitled to grant on, of precedent conditions.....	1058	218
of condition precedent, when necessary .....	1439	292
of condition precedent, when excused.....	1440	292
of obligation, extinguishes its .....	1473	296
by one joint debtor extinguishes liability of all .....	1474	296
to one joint creditor sufficient .....	1475	296
in mode directed by creditor, sufficient .....	1476	296
effect of partial.....	1477	297
when called payment.....	1478	297
application of general.....	1479	297
offer of (see OFFER OF PERFORMANCE).		
when pledgee must demand.....	3001	511
how excused .....	1511	303
effect of prevention of.....	1512	303
ib.....	1513	303
ib.....	1514	303
effect of refusal to accept, before offer.....	1515	303
of conditions of proposal, is acceptance.....	1584	316
of contract, time of.....	1659	327
penalties in contract for non-, void .....	1669	328
extension of time of, how effected.....	1698	332
surety may compel, by principal.....	2846	488
<b>PERILS:</b>		
insured against, what may be.....	2531	445
insured against, effect of remoteness and proximate-ness of....	2626	457
insured against, insurer liable for losses incurred in rescue		
from .....	2627	458
excepted in insurance, effect of loss by .....	2628	458
caused by fraud, insurer not liable for.....	2629	458
caused by negligence, insurer liable for.....	2629	458

	Section.	Page.
<b>PERILS: (Continued.)</b>		
<b>OF THE SEA:</b>		
defined .....	2199	399
marine carrier not liable for damages caused by .....	2197	399
See <b>INSURANCE.</b>		
<b>PERSONAL MORTGAGE: See MORTGAGE, PERSONAL.</b>		
<b>PERSONAL PROPERTY:</b>		
defined .....	663	157
application of interests in real property to .....	701	163
by what law governed .....	946	199
future interest in, how protected .....	947	199
shares of stock are .....	324	75
of wife, not entered in inventory, prima facie not separate .....	173	39
non-negotiable written contract for delivery of, transferable .....	1459	294
contract for sale of .....	1739	341
lien of seller of .....	3049	518
real property, when deemed .....	1338	272
accession to (see <b>ACCESSION</b> ).		
transfer of (see <b>TRANSFER; SALE</b> ).		
bequest of (see <b>BEQUEST; LEGACY; WILL</b> ).		
mortgage of (see <b>MORTGAGE, PERSONAL</b> ).		
pledge of (see <b>PLEDGE</b> ).		
<b>PERSONAL RELATIONS:</b>		
rights of, forbid what .....	48	13
See <b>MARRIAGE; PARENT AND CHILD; MASTER AND SERVANT; GUARDIAN AND WARD.</b>		
<b>PERSONAL REPRESENTATIVES:</b>		
of minor, may disaffirm contract in case of his death .....	29	9
property of intestate passes to .....	1385	279
to distribute property, how .....	1385	279
possession of legacy obtainable only from .....	1363	276
inventory by legatee for life, when to be delivered to .....	1365	276
of seaman, when entitled to his wages .....	2062	383
See <b>WILL; SUCCESSION.</b>		
<b>PERSONAL RIGHTS:</b>		
defined and regulated .....	43	11
<b>PERSONS:</b>		
defined .....	3570	605
rights of, are original civil rights .....	8	3
rights of, may be waived, surrendered or lost .....	9	3
general provisions concerning .....		7
<b>PERSONS OF UNSOUND MIND:</b>		
who are .....	24	8
custody of .....	25	8
cannot disaffirm contract for necessities .....	30	9
contracts of .....	32	9
ib .....	1557	310
ib .....	33	9
powers of, whose incapacity has been adjudged .....	34	9
liable for wrongs .....	35	10
not liable for exemplary damages .....	36	10
marriage of, may be annulled .....	82	22
guardianship of .....	258	53
property of, how acquired by corporations .....	373	87
cannot make will .....	1271	260
<b>PETITION:</b>		
to County Judge for homestead, what to contain .....	1260	257

	Section.	Page.
<b>PEW:</b>		
may be held as an easement.....	801	176
may be held as a servitude.....	802	176
<b>PILOT:</b>		
shipmaster must take, when.....	2036	379
who responsible for negligence of.....	2384	424
See NAVIGATION.		
<b>PIONEER ASSOCIATION:</b>		
may hold how much real estate.....	596	139
<b>PLACE:</b>		
of performance, defined.....	1439	299
where goods sold must be delivered.....	1755	342
where goods sold must be delivered, option as to.....	1756	343
where goods sold must be delivered, notice of option as to.....	1756	343
where thing deposited must be delivered.....	1824	352
of payment need not be stated in negotiable instrument.....	3091	524
at which negotiable instrument must be presented. ....	3131	530
ib.....	3186	539
ib.....	3211	543
at which bill of exchange is payable.....	3212	543
at which protest must be made.....	3228	545
where thing borrowed must be delivered.....	1896	360
where thing hired must be delivered.....	1958	368
of payment of negotiable instrument.....	3099	525
ib. ....	3100	525
<b>PLAINTIFF:</b>		
to make certain additional statements in complaint in actions for divorce.....	131	34
<b>PLEDGE:</b>		
defined.....	2986	509
what to be deemed.....	2987	509
lien of, dependent on possession .....	2988	510
covers increase of property .....	2989	510
lienor may, to extent of lien.....	2990	510
factor may not, property of his principal.....	2368	422
when valid against real owner .....	2991	510
lender, defined. ....	2992	510
pledge lender may withdraw, when.....	2994	510
holder, defined.....	2993	510
holder, obligations of.....	2995	510
further, when may be required.....	2999	511
sale of, may be made, when.....	3000	511
sale of, not until demand made .....	3001	511
sale of, notice of time and place of, necessary.....	3002	511
sale of, notice, when may be waived.....	3003	511
sale of, demand before, may be waived, how.....	3004	512
sale of, pledgeor may compel .....	3007	512
sale of, evidences of debt under.....	3006	512
sale of, pledgeor entitled to surplus at .....	3008	512
sale of, what pledgee may retain from .....	3009	513
sale of, when pledgee may purchase at .....	3010	513
foreclosure of.....	3011	513
may be contained in negotiable instrument .....	3092	524
See LIEN.		
<b>PLEDGE:</b>		
must have possession .....	2988	510
may commit possession to pledge holder.....	2993	510
liable as depositary for reward.....	2997	511



# INDEX.

735

	Section.	Page.
<b>PLEDGEE: (Continued.)</b>		
may require further pledge, when.....	2999	511
may sell thing pledged, when.....	3000	511
how may sell thing pledged.....	3005	512
must not sell evidences of debt.....	3006	512
must demand performance before sale.....	3001	511
must give notice of sale.....	3102	511
may retain what, out of proceeds of sale.....	3009	513
must pay surplus to pledgeor.....	3008	512
cannot purchase, except from pledgeor.....	3010	513
may foreclose right of redemption, how.....	3011	513
may be authorized by Court to purchase.....	3011	513
<b>PLEDGE HOLDER:</b>		
defined.....	2993	510
must enforce all rights of pledgee.....	2996	511
for reward, cannot exonerate himself.....	2995	510
for reward, liable as depositary for reward.....	2997	511
gratuitous, may exonerate himself, how.....	2996	510
gratuitous, liable as gratuitous depositary..	2998	511
can purchase from pledgeor only.....	3010	513
<b>PLEDGEOR:</b>		
must deliver possession.....	2988	510
for benefit of third person, rights of.....	2992	510
for benefit of third person, cannot withdraw pledge, when.....	2994	510
must make further pledge, when. ...	2999	511
entitled to demand before sale.....	3001	511
entitled to notice of sale.....	3002	511
waiver of demand by.....	3004	512
waiver of notice by.....	3003	512
may require sale of thing pledged.....	3007	512
surplus proceeds of sale to be paid to.....	3008	512
thing pledged can be purchased by pledgee, etc., only from...	3010	513
<b>POLICY OF INSURANCE:</b>		
defined.....	2586	452
must specify what.....	2587	453
representation, how affects.....	2575	451
interest of person specified in, alone covered.....	2588	453
interest of principal, how may be covered by.....	2589	453
interest of joint owners, etc., how may be covered by.....	2590	453
who can claim benefit of general description in.....	2591	453
may be made for benefit of successive owners.....	2592	453
transfer of thing insured does not transfer.....	2593	453
transfer of, suspends.....	2593	453
open, defined.....	2595	454
valued, defined.....	2596	454
running, defined.....	2597	454
effect of receipt in.....	2598	454
agreement not to transfer claim under, after loss, void.....	2599	454
express warranty must be in.....	2605	455
positive statement in, is a warranty.....	2607	455
ib.....	2608	455
when avoided by breach of warranty.....	2612	456
of life, may pass by will, transfer, etc.....	2764	475
See INSURANCE.		
<b>POSSESSION:</b>		
summary proceedings for, of property.....	794	175
right to actual, creates legal ownership.....	848	182
owner of property in adverse, may transfer his title.....	1047	217
means of obtaining, of personal property, necessary to valid- ity of gift.....	1147	235

	Section.	Page.
<b>POSSESSION: (Continued.)</b>		
under unrecorded instrument rebuts presumption of good faith .....	1208	248
party in, must be made party to action to quiet title .....	1213	249
of legacies, how obtained .....	1363	276
sale of personal property must be accompanied by actual and continued change of .....	1759	243
damages for unlawful, of real property .....	3334	564
quiet covenant of, implied in hiring .....	1927	364
ib. ....	1955	368
lease, when renewed by continued .....	1945	366
mortgages not entitled to .....	2930	499
mortgagee, when may take, of mortgaged personal property .....	2970	507
personal mortgage void unless recorded or accompanied by actual and continuous .....	2973	507
change of, necessary in pledge .....	2988	510
when transferred for security deemed pledged .....	2987	509
bottomry lien is independent of .....	3027	516
vendor's lien is independent of .....	3046	518
seller of personal property, lien dependent on .....	3049	518
purchaser of real property, lien independent of .....	3050	518
lien for services is dependent on .....	3051	519
factor's lien is dependent on .....	3061	520
banker's lien is dependent on .....	3062	521
shipmaster's lien is independent of .....	3063	521
seaman's lien is independent of .....	3064	521
officer's lien is dependent on .....	3065	521
<b>POSSIBLE:</b>		
object of contract must be .....	1596	317
what is deemed .....	1597	317
<b>POSSIBILITY:</b>		
mere, cannot be transferred .....	1045	217
not deemed an interest of any kind .....	700	163
<b>POSTHUMOUS CHILD:</b>		
when takes by succession .....	698	161
ib. ....	1339	272
birth of, defeats certain future interests .....	739	166
deemed living at the death of parent .....	1398	284
<b>POST-OFFICE: See MAIL.</b>		
<b>POWER:</b>		
minor cannot give delegation of .....	26	8
of minor to disaffirm, and when may exercise such .....	28	8
what express trusts are valid as .....	860	185
ib. ....	858	184
creation of certain, not prohibited .....	861	185
of sale, may be conferred by mortgage .....	2926	496
of sale, under mortgage, how executed .....	2927	498
in relation to real property .....	877	188
defined .....	879	188
author of, defined .....	880	188
holder of .....	880	188
general .....	882	188
special .....	883	188
beneficial .....	884	189
in trust .....	885	189
in trust, general .....	886	189
in trust, special .....	887	189
in trust, are imperative .....	932	196
in trust, effect of right of election under .....	933	196

	Section.	Page.
<b>POWER: (Continued.)</b>		
in trust, shares of beneficiary under.....	934	196
ib.....	935	196
in trust, execution of, after death of trustee.....	936	196
in trust, execution of, when devolves on District Court.....	937	197
in trust, execution may be adjudged in favor of creditors.....	938	197
in trust, execution defective, may be remedied.....	939	197
in trust, execution defective, how affects purchasers.....	915	193
in trust, certain provisions applicable to.....	940	197
who may create.....	888	189
who may hold.....	889	189
how created.....	890	189
may be reserved by grantor of an estate.....	891	189
of revocation of trust, may be reserved by trustor.....	2280	410
when irrevocable.....	892	190
when a lien.....	893	190
given by mortgage, part security.....	894	190
beneficial, passes to insolvents, assignees, etc.....	895	190
execution of, by whom.....	896	190
execution of, by married women.....	897	190
ib.....	898	191
execution of, how made.....	899	191
execution of, by survivors.....	900	191
execution of, by devise or will.....	901	191
execution of, when not to be by will.....	902	191
direction by author, when disregarded.....	903	191
ib.....	904	191
ib.....	905	192
directions by author, when to be followed.....	906	192
consent of third person to, how given.....	907	192
ib.....	908	192
omission to recite.....	909	192
instrument in, deemed conveyance.....	910	192
excessive disposition by virtue of, void only as to excess.....	911	193
suspension of alienation by, how computed.....	912	193
what estate may be given by.....	913	193
how affected by fraud.....	916	193
married women may be vested with.....	914	193
general and beneficial, to married women.....	917	193
absolute, unaccompanied by trust, gives estate in fee, when...	918	193
ib.....	919	194
ib.....	920	194
to owner of estate for years, to devise, effect of.....	921	194
to dispose of fee.....	922	194
to revoke.....	923	194
special and beneficial, who may take.....	924	194
special and beneficial, liable to creditors.....	930	195
construction of certain leasing.....	925	195
to make leases by owner for life.....	926	195
release of such power.....	927	195
to life owner bound by mortgage.....	928	195
effect of such.....	929	195
beneficial, not specified herein, void.....	931	196
instrument granting or reserving, a real instrument.....	1092	223
witness not necessary to validity of instrument granting.....	1098	225
of revocation, when deemed executed.....	1229	251
ib.....	1230	251
to devise, how executed by terms of will.....	1330	271
to executor, to appoint executor, void.....	1372	277
<b>POWER OF ATTORNEY:</b>		
by married woman, void unless acknowledged, how.....	1093	223

	Section.	Page.
<b>POWER OF ATTORNEY: (Continued.)</b>		
a "real instrument".....	1092	224
revocation of, a real instrument.....	1092	224
witness, when not necessary to its validity.....	1098	225
instruments executed under, when deemed recorded.....	1164	237
how revoked.....	1165	237
must be exhibited to officer taking acknowledgment.....	1177	240
duties of gratuitous employé accepting.....	1977	371
to execute personal mortgage, requisites of.....	2960	504
See ATTORNEY IN FACT.		
<b>PRECEDENT CONDITIONS: See CONDITIONS.</b>		
<b>PREFERENCE:</b>		
common carrier of messages must not give, except to Govern- ment.....	2207	400
ib.....	2208	401
in assignment for benefit of creditors, what may be given.....	3453	585
in assignment for benefit of creditors, must be absolute.....	3454	586
in assignment for benefit of creditors, cannot affect right to priority otherwise created.....	3455	586
in assignment for benefit of creditors in case of joint debtors.	3456	586
<b>PREMIUM:</b>		
of insurance, how payable.....	446	103
when earned.....	2616	456
return of, when must be made.....	2617	456
return, when need not be made.....	2618	456
return, in case of fraud.....	2619	456
return, in case of over-insurance.....	2620	457
return, contribution by simultaneous insurers.....	2621	457
return, contribution by successive insurers.....	2622	457
rate of, must be specified in policy.....	2587	453
effect of receipt of, in policy.....	2598	454
<b>PRESENTMENT:</b>		
<b>OF NEGOTIABLE INSTRUMENT:</b>		
to principal debtor not necessary to charge.....	3130	530
to be made, how.....	3131	530
to be made, by whom.....	3131	530
to be made, to whom.....	3131	530
to be made, where.....	3131	530
to be made, when.....	3131	530
apparent maturity for purpose of.....	3132	531
ib.....	3134	531
ib.....	3135	531
when excused.....	3156	535
ib.....	3157	535
delay in, when excused.....	3158	536
when waived.....	3159	536
<b>OF BILL OF EXCHANGE:</b>		
<i>For acceptance:</i>		
of one of a set, sufficient.....	3175	538
may be made, when.....	3185	539
to be made, how.....	3186	539
to be made, by whom.....	3186	539
to be made, to whom.....	3186	539
to be made, where.....	3186	539
to be made, when.....	3186	539
to one of joint drawees, sufficient.....	3187	540
to drawee in case of need, necessary.....	3188	540
within what time necessary to charge drawer, etc.....	3189	540
how excused.....	3218	544
delay in, how excused.....	3219	544

	Section.	Page.
<b>PRESENTMENT: (Continued.)</b>		
<i>For payment:</i>		
where to be made.....	3211	543
ib.....	3212	543
effect of delay in.....	3213	543
how excused.....	3220	544
<b>OF PROMISSORY NOTE:</b>		
effect of delay in.....	3248	548
<b>OF CHECK:</b>		
effect of delay in.....	3255	548
See <b>BILL OF EXCHANGE; NEGOTIABLE INSTRUMENT.</b>		
<b>PRESSURE:</b>		
trustee must not use.....	2228	404
partner must not use.....	2411	427
See <b>UNDUE INFLUENCE.</b>		
<b>PRESUMPTION:</b>		
established by lapse of time in divorce.....	125	32
such may be rebutted .....	126	32
of actual residence does not apply, in divorce.....	129	33
of truth of certain allegations, in divorce.....	131	34
of legitimacy of children.....	193	43
of relinquishment of control of child.....	211	46
of fraudulent transfer, in certain case.....	854	183
of wilful default in case of collision of ship from breach of rules .....	972	203
of time of delivery of grant.....	1055	218
that fee simple title passes.....	1077	221
ib. ....	1121	231
that gift is made in view of death.....	1150	235
in favor of holder of recorded instrument.....	1206	247
that an obligation is joint and not several.....	1428	290
of consideration in novation .....	1532	306
of intent to extinguish old obligation in novation.....	1533	306
of intent to extinguish contract, when it is cancelled.....	1699	332
of term of hiring servant.....	2010	376
ib. ....	2011	376
of undue influence in certain case, on the part of trustee.....	2235	405
that certain property is partnership.....	2406	427
that representation in insurance refers to time of completing contract.....	2577	451
that person insured has knowledge of prior loss.....	2671	463
of actual loss of ship.....	2707	467
that encumbrance is acquired in good faith .....	2944	501
of consideration in negotiable instrument.....	3104	526
that bill of exchange is dishonored .....	3133	531
that creditor's retention of part performance is not voluntary	1477	297
that written instrument imports consideration.....	1096	255
ib.....	1629	323
as to origin of uncertainty in contract. ....	1649	325
ib. ....	1654	326
that depositary is in fault in certain cases.....	1838	354
as to term for which real property is hired.....	1943	366
that hiring of real property is renewed.....	1945	366
that certificate of shipmaster in favor of sailor, etc., is true...	2059	382
that managing owner of ship has no compensation.....	2072	384
as to damages caused by conversion of personal property.....	3336	565
as to adequacy of damage as relief.....	3387	574
in revising contract, that parties intended a fair agreement...	3400	577
that certain transfers, without change of possession, are fraud- ulent.....	3440	583
of fraud, how repelled.....	3442	583
See <b>EVIDENCE.</b>		

	Section.	Page.
<b>PREVENTION OF PERFORMANCE :</b>		
when an excuse.....	1511	302
rights of debtor in case of .....	1512	303
ib.....	1513	303
ib.....	1514	303
of reduction of contract to writing, effect of .....	1623	321
<b>PREVENTIVE RELIEF :</b>		
to be given only in special cases .....	3275	553
ib.....	3366	569
how given.....	3368	579
in general.....		579
See INJUNCTION.		
<b>PRICE :</b>		
defined .....	1721	338
on failure to pay, seller may resell or rescind.....	1749	342
when to be paid.....	1784	347
when agent may receive.....	2325	417
ib.....	2326	417
of real property, priority of mortgage for.....	2898	494
of real property, lien for.....	3046	518
of personal property, lien for.....	3049	518
<b>PRINCIPAL :</b>		
incident passes by transfer.....	1084	222
ib.....	3540	599
attorney in fact executing instrument must subscribe name of .....	1095	225
factor must follow directions of.....	2027	378
consent of, necessary to release of factor from liability.....	2030	378
<b>IN AGENCY :</b>		
and agent defined.....	2295	413
may authorize agent to do what .....	2304	414
agent cannot have authority to defraud.....	2306	414
consideration not necessary to bind.....	2308	414
must have power to do act ratified.....	2312	415
authority conferred by.....	2315	415
may be disobeyed, when.....	2320	416
represented by agent, for what purposes.....	2330	417
bound by incomplete execution of authority, when.....	2331	418
deemed to have notice of what.....	2332	418
bound by act in excess of authority, how far.....	2333	418
bound by act under ostensible authority, when.....	2334	418
exonerated by payment to agent, when.....	2335	418
claim against agent may be set off against, when.....	2336	418
responsible for wrongs of agent, when.....	2337	419
agent, when responsible as.....	2343	419
agent must not deliver to, when.....	2344	420
has no connection with sub-agent, when.....	2350	420
represented by sub-agent, when.....	2351	420
agency may be revoked by, when.....	2356	421
agent of agent not responsible to.....	2021	377
<b>IN GUARANTY :</b>		
consent of, not necessary to guaranty.....	2788	479
removal of, from the State, when equivalent to insolvency.....	2802	482
liability of guarantor on default of.....	2807	483
notice to guarantor of default of, when necessary.....	2808	483
obligation of guarantor cannot exceed that of.....	2809	483
guarantor liable notwithstanding disability of.....	2810	483
guaranty for successive liabilities of.....	2814	484
guarantor exonerated by certain dealings of creditor with.....	2819	484
guarantor not exonerated by delay in proceeding against.....	2823	485
guarantor not exonerated by discharge of, by act of law.....	2825	485
guarantor indemnified by, liable to extent of indemnity.....	2824	485

# INDEX.

741

	Section.	Page.
<b>PRINCIPAL: (Continued.)</b>		
<b>IN SURETYSHIP:</b>		
apparent, may show that he is surety.....	2832	486
surety may require creditor to proceed against.....	2845	488
surety may compel, to perform obligation.....	2846	488
surety may enforce creditor's remedies against.....	2848	488
surety entitled to application of property of, to discharge of obligation.....	2850	488
must reimburse surety.....	2847	488
See AGENCY; GUARANTY; SURETYSHIP.		
<b>PRINTING:</b>		
parts of contract in, inferior to those in writing.....	1651	326
corporations for, may be formed.....	286	61
<b>PRIORITY:</b>		
of record establishes priority of right.....	1212	248
of liens to be according to date.....	2897	494
mortgage for price of land has.....	2898	494
lien upon single fund has, over lien upon several funds.....	2899	494
of different employments.....	1988	373
of surety's property over principal's.....	2850	488
of bottomry liens.....	3029	516
of liens, Court may determine, in certain actions.....	2976	508
<b>PRIVATE PARTY:</b>		
grant interpreted against.....	1070	221
contract interpreted against.....	1654	326
<b>PRIVILEGED COMMUNICATION:</b>		
defined.....	47	13
<b>PRIVILEGED PUBLICATION:</b>		
defined.....	47	13
<b>PROBATE:</b>		
will obtained through fraud may be denied.....	1272	261
conditional will, when may be denied.....	1280	262
what will entitle nuncupative will to.....	1288	263
of nuncupative will.....	1290	264
<b>PROBATE COURT:</b>		
appointment of guardians by.....	243	50
ib.....	244	51
jurisdiction in such cases.....	245	51
Judge of, may give consent to apprenticeship of child, when.....	265	54
See COUNTRY COURT.		
<b>PROCEEDINGS:</b>		
contract restraining legal, void.....	1672	328
judicial, when not to be restrained by injunction.....	3423	579
<b>PRODUCT OF THE MIND:</b>		
subject of ownership.....	655	155
subject of ownership, to what degree.....	980	208
joint authorship of.....	981	208
transfer of.....	982	208
effect of publication of.....	983	208
rights of subsequent author.....	984	208
private writings.....	985	209
<b>PRODUCTS OF LAND:</b>		
owner of property entitled to.....	732	165
tenant for years, or at will, entitled to.....	819	179

	Section.	Page.
<b>PROFESSION: See BUSINESS.</b>		
<b>PROFIT AND LOSS:</b>		
shares of partners in .....	2403	426
See PROFITS; LOSS.		
<b>PROFITS:</b>		
made by partner belongs to firm, when.....	2435	430
special partner may draw his share of.....	2494	439
renunciation of future partnership exonerates partner.....	2417	428
who has insurable interest in.....	2664	462
measure of indemnity for loss of, under insurance.....	2738	472
loss of, under insurance, when presumed.....	2740	472
<b>PROMISE:</b>		
of marriage governed by same rules as other contracts.....	63	19
of marriage, damages for breach of.....	3329	564
false, when fraudulent.....	1672	313
ib. ....	1710	335
representation in insurance as to future, when deemed.....	2574	451
to answer for third person.....	2794	480
to accept bill of exchange, when equivalent to acceptance.....	3197	541
<b>PROMISSORY NOTE:</b>		
defined.....	3244	547
apparent maturity of.....	3145	531
instrument in form of bill of exchange, when deemed.....	3245	547
bill of exchange, when converted into.....	3246	547
certain provisions applicable to.....	3247	547
effect of delay in presentment of.....	3248	548
See NEGOTIABLE INSTRUMENT.		
<b>PROOF:</b>		
of consent to marriage, how made.....	57	17
of illegitimacy, how made.....	195	43
of nuncupative will.....	1289	225
of destruction or cancellation of will, how made.....	1292	265
of ownership, finder may require.....	1866	357
of loss of freight in certain case, what required.....	2202	400
<i>Of Instruments for Record:</i>		
letters patent do not require further.....	1159	236
by other than subscribing witness.....	1163	237
who may take, in this State.....	1169	238
ib. ....	1170	238
who may take, out of this State.....	1171	239
who may take, out of the United States.....	1172	239
may be taken by deputy.....	1173	239
interpreter may be employed in taking.....	1182	242
how made.....	1183	242
subscribing witness to be personally known.....	1184	242
witness to prove what.....	1185	242
certificate of officer taking.....	1186	243
handwriting may be proved, when.....	1187	243
certificate of officer on.....	1189	244
evidence must prove, what.....	1188	244
officers taking, authorized to do certain things.....	1190	244
officers taking, to affix their seals and signatures.....	1191	244
action to obtain.....	1193	245
heretofore taken, governed by then existing laws.....	1194	245
parties may have action to correct defects in certificate of.....	1192	245
statutes curing void or defective, preserved.....	1196	246
<i>Of Loss Under Insurance:</i>		
how given.....	2634	458
objection to, how waived.....	2635	459
ib. ....	2636	459
certificate of, when dispensed with.....	2637	459



	Section.	Page.
<b>PROPERTY :</b>		
rights of, are original civil .....	8	3
rights of, may be waived, surrendered or lost.....	9	3
of husband and wife, may be used to support children .....	143	36
of husband and wife, contracts concerning.....	158	38
of husband and wife, may be held in joint tenancy, etc.....	161	38
of husband and wife, rights of, how governed.....	183	41
community, defined.....	164	39
ib.....	687	160
community, when Court may resort to, for alimony .....	141	35
community, power of husband over.....	178	40
community, disposition of, on divorce. ....	147	36
ib.....	148	37
ib.....	149	37
community, distribution of, on death of wife.....	1396	283
community, distribution of, on death of husband.....	1397	283
separate, of husband and wife, may be used for support of child .....	143	36
separate, of husband, when liable for alimony.....	141	35
separate, of husband, defined .....	163	39
separate, of husband, when not liable for wife's debts.....	176	40
separate, of wife, defined.....	162	32
separate, of wife, she may dispose of it by will.....	162	32
separate, of wife, when liable for support of husband .....	144	36
separate, of wife, not liable for husband's debts.....	177	40
of child, parent has no control over.....	202	44
of child, when liable for parent's support.....	201	44
corporations may acquire.....	365	85
in general.....	654	155
nature of.....	654	155
ownership in.....	655	155
how terminated.....	655	156
is either real or personal.....	657	156
real, defined.....	658	156
personal, defined.....	663	157
in mines.....	662	157
always has an owner.....	669	157
what, owned by the State.....	670	157
who may own .....	671	158
aliens inheriting, when must assert claim.....	672	158
interest in .....	678	159
interests in, none, unless specified in the Code.....	701	162
ib.....	702	162
interests in, absolute .....	679	159
interests in, qualified.....	680	159
interests in, several.....	681	159
interests in, joint .....	683	159
interests in, partnership .....	684	160
interests in, in common.....	685	160
interest in, present.....	689	160
future interests in.....	690	160
future interests in, rights of posthumous children in.....	698	161
future interests in, pass by transfer.....	699	161
ib.....	700	162
future interests in, none, unless specified.....	703	163
future interests in, how defeated.....	739	166
ib.....	740	166
future interests in, when not defeated.....	741	166
ib.....	742	166
future interests in, vested....	694	161
future interests in, contingent.....	695	161
future interests in, contingent, may be alternative.....	696	161
future interests in, contingent, not void because improbable...	697	161
interests in, perpetual.....	691	161

	Section.	Page.
<b>PROPERTY: (Continued.)</b>		
interest in, limited.....	692	161
conditional ownership in.....	707	162
restraints upon alienation of.....	711	163
ib.....	716	163
ib.....	715	163
accumulations of income of.....	748	166
income of, defined.....	1270	166
what may be disposed of by will.....	1274	260
ib.....	1000	261
acquisition of.....		211
acquisition of, by occupancy (see OCCUPANCY).....		211
acquisition of, by prescription.....		212
acquisition of, by accession (see ACCESSION).....		212
acquisition of, by transfer (see TRANSFER; GRANT).....		216
acquisition of, by succession (see SUCCESSION).....		278
acquisition of by will (see WILL).....		259
partnership (see PARTNERSHIP).		
See REAL PROPERTY; PERSONAL PROPERTY; ESTATES; SERVITUDES; USES AND TRUSTS; POWERS.		
<b>PROPOSAL:</b>		
to contract, acceptance of, how made.....	1532	315
to contract, acceptance of, must be absolute.....	1585	316
what is deemed acceptance of.....	1584	316
qualified acceptance of, is new proposal.....	1585	316
revocation of.....	1586	316
revocation of, how made.....	1587	316
See CONSENT.		
<b>PROTECTION:</b>		
right of, against restraint and injury, etc.....	43	11
to personal relations.....	48	13
what force may be used in seeking.....	49	13
<b>PROTEST:</b>		
notice of dishonor of foreign bill can be given only by notice of.....	3225	546
by whom made.....	3226	545
how made.....	3227	545
where made.....	3228	545
when made.....	3229	545
how excused.....	3230	545
notice of, how given.....	3231	545
effect of waiver of.....	3232	546
<b>PROVISIONS:</b>		
for domestic use, implied warranty on sale of.....	1775	346
<b>PUBLIC:</b>		
grants to be interpreted against grantee.....	1070	221
contracts to be interpreted against private party.....	1654	326
deceit upon the.....	1711	335
<b>PUBLICATION:</b>		
libel by unprivileged.....	45	11
privileged, defined.....	47	13
requisites, when service of summons made by, in divorce.....	130	33
of assessment notice.....	336	78
of delinquent assessments.....	339	79
of product of the mind, effect of.....	983	208
of notice of dissolution of partnership.....	2453	433
of change of name of partnership.....	2469	435
of certificate of formation of special partnership.....	2483	437

	Section.	Page.
<b>PUBLICATION: (Continued.)</b>		
affidavit of such publication.....	2484	437
of notice to call for levy of assessment on interests in mining partnership.....	2518	442
of notice of dissolution of special partnership.....	2509	441
of notice to copartners in mining partnership.....	2518	442
<b>PUFFING:</b>		
at auction, a fraud.....	1797	348
<b>PURCHASE:</b>		
from subsequent grantor without notice of prior unrecorded instrument, valid.....	1204	247
buyer at auction may rescind, when puffing has been practised	1797	348
trustee cannot enforce claim adverse to trust, obtained by.....	2263	409
See SALE.		
<b>PURCHASE MONEY:</b>		
priority of mortgage for.....	2898	494
lien for.....	3046	518
homestead liable on mortgage for.....	1239	253
See PRICE.		
<b>PURCHASER:</b>		
highest bidder to be, at auction sale of delinquent stock.....	342	79
when corporation may be, at auction sale of delinquent stock	343	80
of franchise of corporations, powers and duties of.....	389	90
ib.....	390	90
resulting trust not to prejudice.....	856	184
omission to declare trust in conveyance, how affects.....	869	186
remedy of, against defective execution.....	915	193
grant, how far conclusive as to.....	1123	232
for value, defined.....	1200	246
instruments, when void against subsequent.....	1227	251
instruments, when not void against subsequent.....	1228	251
rights of, from devisee not impaired by his conveyance, when	1364	276
when sale of personal property void against.....	1759	343
when mortgage of personal property void against subsequent	2971	507
ib.....	2973	507
pledgee cannot be, from pledgeor, except by direct dealing	3010	513
of real property, lien of.....	3050	518
without notice, conditional transfer absolute in favor of.....	2923	498
certain transfers void against.....	3440	583
lien of seller or buyer not valid against subsequent.....	3048	518
grant by person having power of revocation operates as revocation in favor of, when.....	1229	251
See GRANT; LIEN; MORTGAGE; NOTICE; RECORDING; ENCUMBRANCE.		
<b>Q</b>		
<b>QUALITY:</b>		
implied warranty of, of goods sold by sample.....	1766	354
implied warranty of, on executory sale.....	1767	344
implied warranty of, by manufacturer.....	1768	345
ib.....	1769	345
ib.....	1770	345
implied warranty of, of goods inaccessible to buyer.....	1771	345
implied warranty of, general.....	1773	346
implied warranty of, domestic provisions.....	1776	347
damages for breach of warranty of, of personal property.....	3323	562

	Section.	Page.
<b>QUANTITY:</b>		
implied warranty as to.....	1773	346
<b>QUESTION OF FACT:</b>		
actual fraud is.....	1574	313
<b>QUIET ENJOYMENT:</b>		
covenant of, runs with the land .....	1463	295
executory contract of sale binds seller to insert covenant of...	1734	339
ib.....	1927	364
implied in hiring.....	1955	368
<b>R</b>		
<b>RAILROAD CORPORATIONS:</b>		
may be formed.....	286	61
articles of incorporation must state what, in addition.....	291	65
prerequisites to filing articles of incorporation.....	292	65
Directors to be elected, when.....	453	104
assessment of stock, how made and collected.....	454	104
additional provision in assessment and transfer of stock.....	455	105
may borrow money and issue bonds.....	456	105
to provide sinking fund to pay bonds... ..	457	105
capital stock to be fixed.....	458	106
certificate of payment of fixed capital stock.....	459	106
enumeration of powers.....	465	107
map and profile to be filed.....	466	109
may change line of.....	467	109
forfeiture of franchise.....	468	109
crossings and intersections.....	469	109
condemnation.....	469	109
not to use public streets, etc., except.....	470	110
not to charge fare to and from points in a city... ..	471	110
when crossing highways, etc., how acquires right of way.....	472	110
may consolidate.....	473	111
proceedings to consolidate.....	473	111
check to be affixed to all baggage.....	479	111
damage for refusing so to do.....	479	112
annual report to be verified.....	480	112
form of report.....	480	112
duties of.....	481	113
to pay damages for refusing transportation.....	482	113
to furnish accommodations for passengers.....	483	113
to post regulations.....	484	113
not responsible for injuries incurred by violating rules.....	484	113
to pay damages.....	485	114
not liable in certain cases .....	485	114
may recover damages, when.....	485	114
regulations of trains.....	486	114
penalty for violating such.....	486	114
conductor may eject passengers, when.....	487	115
officers to wear badge.....	488	115
rates of charges.....	489	115
passenger tickets, how issued, and to be good for six months.	490	116
character of iron to be used.....	491	116
<b>STREET:</b>		
may be formed.....	286	61
articles of incorporation to state what additional facts.....	291	65
prerequisites to filing articles of incorporation.....	292	65
authority to lay track, how obtained.....	497	117
restrictions as regards granting right of way.....	498	117
cities and towns may make rules to govern.....	499	118

	Section.	Page.
<b>RAILROAD CORPORATIONS: (Continued.)</b>		
penalty for overcharging.....	500	119
to provide and furnish passenger tickets.....	501	119
penalty.....	501	119
trial, proof and limitation.....	502	119
city or town to reserve certain rights.....	503	119
license to be paid.....	504	120
track for grading purposes.....	505	120
general provisions applicable.....	506	120
<b>RANSOM:</b>		
of ships and cargo.....	2380	424
<b>RATE OF INTEREST:</b>		
annual.....	1916	362
legal.....	1917	362
ib.....	1918	362
on judgments.....	1920	362
on loan under bottomry.....	8022	515
on loan under respondentia.....	8039	517
See INTEREST.		
<b>RATIFICATION:</b>		
of voidable contract, when may be made.....	1588	317
ib.....	2310	415
partial, when total.....	2311	415
when void.....	2312	415
to prejudice of third person forbidden.....	2313	415
rescission of.....	2314	415
See AGENCY; AGENT.		
<b>REAL PROPERTY:</b>		
defined.....	658	156
mines are.....	662	157
interests in, how denominated.....	701	162
application of interests in, to personal property.....	702	162
limitation on leases of certain.....	717	163
ib.....	718	164
general provisions concerning.....	765	169
estates in.....	761	170
estates of inheritance in.....	762	170
fee simple estates in.....	762	170
fees-tail and conditional fees abolished.....	763	170
contingent remainders in.....	764	171
freehold.....	765	171
chattels real, or estates for years in.....	765	171
chattel interests, or estates at will in.....	765	171
estates in, for the life of third person.....	766	171
future estates in.....	767	171
estates in reversion in.....	768	171
estates in remainder in.....	769	171
creation of remainders, future and contingent in.....	773	172
limitation of successive estates for life in.....	774	172
remainders on estate in, for life of third person.....	775	172
ib.....	776	173
estate in, for life, remainder of.....	778	173
burdens and servitudes upon.....	801	176
ib.....	802	176
rights of owners of.....	829	180
ib.....	817	178
rights of, in respect to water.....	830	180
ib.....	818	178
how may be used by tenant for life.....	818	179
how may be used by tenant for years at will.....	819	179
ib.....	820	179

	Section.	Page.
<b>REAL PROPERTY : (Continued.)</b>		
remedies of grantees for rents and reversions of.....	821	179
remedies of lessees against assigns of lessor of.....	822	179
remedies on leases for life, for rent of.....	823	179
rent on, how recovered.....	823	179
ib.....	824	179
who may sue for injury to inheritance in.....	825	180
boundaries of, by water.....	830	180
boundaries of, by ways.....	831	181
lateral and subjacent support to.....	832	181
trees.....	833	181
obligations of owners of.....	840	181
tenant for life in, duties of.....	840	181
coterminous owner, rights of.....	841	181
uses and trusts in.....	856	182
disposition of, to whom must be made.....	877	183
power in relation to.....	994	188
ownership of instruments affecting title to.....	1076	209
words of inheritance not necessary to pass a fee in.....	1077	221
fee simple title in, when presumed to pass.....	1078	221
subsequently acquired title to, passes by operation of law.....	1074	222
construction of words used in description of, in a grant.....	1093	221
instruments affecting, called "real instruments".....	3046	223
lien of seller of.....	3050	518
lien of purchaser of.....	1338	518
when deemed personal, after testator's death.....	1731	272
agreement for sale of.....	1741	339
ib.....	1732	341
agreement for sale of, authority of agent to execute to be in writing.....	1733	339
agreement for sale of, form of grant in execution of.....	1734	339
agreement for sale of, what covenants required by.....	1735	339
form of such covenants.....		340
sale of (see SALE).		
transfer of (see TRANSFER ; GRANT).		
uses and trusts in (see USES AND TRUSTS).		
powers in (see POWERS).		
accession to (see ACCESSION).		
hiring of (see HIRING).		
mortgage of (see MORTGAGE, REAL).		
<b>REASON :</b>		
ceasing, the rule should cease.....	3510	595
being the same, the law should be the same.....	3511	595
<b>RECEIPT :</b>		
party performing obligation entitled to written.....	1499	301
in policy of insurance, effect of.....	2598	454
<b>RECEIVER :</b>		
Court may appoint, to enforce alimony.....	140	35
on dissolution of corporations.....	400	92
powers of such.....	402	92
<b>RECORDER :</b>		
certificate of marriage to be filed with.....	74	20
declaration of marriage to be filed with.....	75	21
selection of right of way by corporation to be transmitted to.....	371	87
City or County, may take proof or acknowledgment of instruments.....	1170	239
real instruments to be recorded in office of County.....	1217	250
duties of County.....	1220	250
certificate of formation of special partnership to be filed with.....	2480	437
notice of dissolution of special partnership to be filed with.....	2509	441

# INDEX.

749

	Section.	Page.
<b>RECORDER: (Continued.)</b>		
entry of satisfaction of mortgage to be made in presence of...	2948	502
personal mortgage to be recorded with what.....	2963	505
See RECORDING.		
<b>RECORDING:</b>		
of marriage certificate.....	74	20
of marriage declaration.....	75	21
of inventory of separate property of wife.....	171	39
effect of such.....	173	39
effect of non-recording such inventory.....	173	39
of marriage settlements.....	185	41
effect of such.....	186	41
of by-laws of corporation.....	304	68
transfers of real property.....		236
letters patent entitled to, without acknowledgment.....	1159	236
effect of such.....	1159	236
of real instruments.....	1160	236
of instruments evidencing judgment title.....	1161	236
what is not entitled to.....	1162	236
instrument proved by other than subscribing witness.....	1163	237
instrument executed under power of attorney.....	1164	237
effect of want of.....	1201	247
ib.....	1202	247
priority of, establishes priority of right.....	1212	248
prior, of subsequent instrument void as to prior instrument...	1203	247
purchase from subsequent grantee without notice of prior un-		
recorded grant, valid.....	1204	247
when prior and subsequent grant both recorded, vendee under		
the latter takes with notice of the former.....	1205	247
holder of recorded instrument presumed as against holder of		
unrecorded.....	1206	247
actual notice of unrecorded instrument by holder of recorded		
subsequently executed instrument, evidence of bad faith....	1207	248
unrecorded instruments void as against encumbrances.....	1209	248
of instruments affecting homesteads.....	1240	254
of homestead declaration.....	1254	257
of homestead title.....	1264	259
mode of.....	1217	250
instruments, when deemed recorded.....	1218	250
books of record.....	1219	250
transfers of ships.....	1221	250
of certificate of formation of special partnership.....	2486	437
of renewal of special partnership.....	2485	438
of dissolution of special partnership.....	2509	441
of real mortgages.....	2941	501
certain provisions concerning, applicable to real mortgages...	2942	501
encumbrances protected by.....	2943	501
what must be recorded as a mortgage...	2946	502
assessment of mortgage.....	2947	502
of personal mortgage.....	2963	505
ib.....	2964	506
of personal mortgage in different places.....	2965	506
of personal, time allowed mortgagee.....	2966	506
of mortgage on property in transit.....	2967	506
of mortgage on property of common carrier.....	2968	506
effect of removing property mortgaged from place of.....	2969	506
ib.....	2970	507
ib.....	2971	507
of mortgage, notice to whom.....	2972	507
satisfaction of personal mortgage.....	2973	507
satisfaction of real mortgage.....	2950	502
power of attorney to execute personal mortgage.....	2960	504

	Section.	Page.
<b>RECRIMINATION:</b>		
divorce to be denied on showing.....	112	29
defined.....	122	31
condonation in recriminatory defence bar to such defence.....	123	31
absence of, to be shown affirmatively in complaint.....	131	34
See DIVORCE.		
<b>REDEMPTION:</b>		
of franchise by corporation .....	392	91
person having interest in property subject to lien, has right of.....	2903	495
inferior lienor has right of.....	2904	495
how made.....	2905	495
contract in restraint of, void.....	2889	493
right of, may be foreclosed.....	2931	499
ib.....	2975	508
See LIEN; MORTGAGE.		
<b>RE-DELIVERY:</b>		
of grant to grantor does not operate as transfer ....	1060	219
<b>RE-ENTRY:</b>		
by grantor or lessor, when and how made .....	793	175
right of, for breach of condition subsequent, transferable .....	1046	217
<b>REINSURANCE:</b>		
defined .....	2646	460
what must be communicated on.....	2647	460
presumed to be against liability.....	2648	460
original insured has no interest in.....	2649	460
See INSURANCE.		
<b>RELATIONSHIP:</b>		
husband and wife cannot by contract impair their legal.....	159	38
degrees of, how computed.....	1389	282
of half-blood gives right to succeed.....	1389	282
succession through illegitimate, when allowed .....	1388	282
<b>RELATIVES:</b>		
mutual right of defence of .....	43	11
ib.....	49	13
may protect child from parental abuse.....	203	44
legacies to, when chargeable with debts of testator.....	1361	276
when illegitimate, take by succession.....	1388	282
of half-blood succeed alike with whole blood.....	1389	282
alienage of, does not affect right of succession.....	1399	284
<b>RELEASE:</b>		
of future interests in property .....	699	161
of power to make leases by owner for life.....	927	195
of debtor by substitution of new one.....	1531	305
by creditor, how made.....	1541	307
effect of general .....	1542	307
of several joint debtors.....	1543	307
<b>RELIEF:</b>		
in general.....	3274	553
compensatory, the usual form of.....	3275	553
specific and preventive, limited to special cases.....	3369	570
from forfeiture.....	3369	570
See DAMAGES; SPECIFIC RELIEF; PREVENTIVE RELIEF; INJUNCTION.		
<b>RELIGIOUS, SOCIAL AND BENEVOLENT CORPORATIONS:</b>		
may be formed.....	236	61



	Section.	Page.
<b>RELIGIOUS, SOCIAL AND BENEVOLENT CORPORATIONS:</b> (Continued.)		
married women may become corporators, etc., of.....	285	60
how formed .....	593	138
articles of incorporation to state additional facts.....	594	138
may hold what amount of property.....	595	139
Masons, Odd Fellows and Pioneers may hold, how much.....	596	139
annual report.....	597	139
when forfeits franchise and lands.....	598	139
may, by order of Court, sell or mortgage property.....	599	140
proceedings thereon.....	599	140
may prove error what, in by-laws.....	600	141
members admitted after incorporation.....	601	141
membership not transferable .....	602	141
<b>REMAINDERS:</b>		
defined.....	769	171
contingent, on prior remainder in fee.....	772	172
contingent upon a term of years.....	777	173
when may be created.....	773	172
upon estates <i>per auter vie</i> .....	775	172
upon estates <i>per auter vie</i> , when takes effect.....	776	173
for life upon a term of years.....	778	173
upon a contingency.....	779	173
to heirs, what title vests under .....	780	173
construction of certain .....	781	173
owner of estate in, may sue for injury to inheritance.....	825	180
meaning of "death without heirs," etc., in certain.....	1075	221
death of devisee before testator does not affect certain inter- ests in.....	1344	273
See FUTURE ESTATES; FUTURE INTERESTS.		
<b>REMOVAL:</b>		
of guardian.....	253	52
of officer of corporation.....	309	70
of thing bought, after delivery.....	1784	347
of trustee for holding adverse interests.....	2232	405
of principal in guaranty from State, when equivalent to insol- vency.....	2802	482
of recorded mortgaged personal property, effect of .....	2970	507
ib. ....	2969	506
<b>RENT:</b>		
when tenant liable for double.....	791	175
ib. ....	792	175
right of taking, may be held as a servitude.....	802	176
remedies for recovery of.....	821	179
remedies for recovery of, by assignees.....	822	179
under lease for life, how recovered .....	823	179
dependent on life, when recoverable.....	824	180
payment of, by tenant to grantor, when binding on grantees...	1126	232
covenant for payment of, runs with the land.....	1463	295
term of hiring, how indicated by .....	1944	366
acceptance of, when operates as renewal of lease.....	1945	366
when payable .....	1947	367
forfeited by letting room in parts.....	1949	367
<b>RENUNCIATION:</b>		
of partnership exonerates partner, when.....	2417	428
of partnership, effect of.....	2418	428
<b>REPAIR:</b>		
owner of estate for life, to keep buildings in.....	840	181
coterminous owners bound to keep fence in.....	841	181

	Section.	Page.
<b>REPAIR:</b> ( <i>Continued.</i> )		
tenant for life to keep fence in.....	840	181
owner for voyage to keep ship in.....	965	201
borrower must, when.....	1889	359
hirer must, when.....	1929	364
landlord must, when.....	1941	365
tenant may, at expense of landlord, when.....	1942	366
letter of personal property must.....	1955	368
hirer of personal property may, at expense of letter.....	1956	368
of ship, shipmaster may contract for.....	2376	423
<b>REPEAL:</b>		
of former statutes.....	3591	608
<b>REPORTS:</b>		
of official proceedings, privileged.....	47	13
false, by officer of corporation.....	316	72
<b>REPOSSESSION:</b> See <i>RE-ENTRY.</i>		
<b>REPRESENTATION:</b>		
who succeed to property by right of.....	1398	284
authority of agent to make.....	2319	416
<b>IN INSURANCE:</b>		
may be oral or written.....	2571	451
when may be made.....	2572	451
how interpreted.....	2573	451
as to future, when deemed promise.....	2574	451
how may affect policy.....	2575	451
when may be withdrawn.....	2576	451
to what time deemed to refer.....	2577	451
concerning information.....	2578	451
when deemed false.....	2579	452
effect of falsity in.....	2580	452
materiality of, how determined.....	2581	452
rules concerning, govern modification of contract.....	2582	452
<b>Marine:</b>		
effect of falsity in.....	2676	463
concerning expectation, effect of.....	2677	463
<b>Fire:</b>		
effect of falsity in.....	2752	474
<b>RESCISSION:</b>		
minor has power of.....	29	9
person not entirely without understanding has power of.....	33	9
accepting grant without covenants does not bar.....	1115	230
of novation.....	1536	306
third person may enforce contract before.....	1559	310
consent not free, subject to.....	1566	311
extinguishes contract.....	1688	331
of contract, in what cases allowed.....	1689	331
of contract, how effected.....	1691	331
of contract, not barred by stipulation.....	1690	342
of sale allowed to seller in case of non-payment of price.....	1749	347
buyer has right of, if seller refuses to allow inspection.....	1785	347
buyer has right of, on breach of warranty.....	1786	347
buyer at auction, when entitled to.....	1797	348
of ratification.....	2314	415
of insurance allowed for concealment, when.....	2569	450
ib.....	2562	449
of insurance allowed for false representation, when.....	2580	452
of insurance allowed for violation of warranty, etc.....	2608	455
of insurance allowed for fraudulent valuation.....	2736	471
of insurance allowed for alteration increasing risk.....	2753	474

# INDEX

753

	Section.	Page.
<b>RESCISSION: (Continued.)</b>		
of alteration of obligation does not restore liability of guarantor.....	2821	484
stoppage in transit is not.....	3080	523
of contracts, when may be adjudged.....	3406	577
of contracts, for mistake.....	3407	578
of contracts, requirements on adjudging.....	3408	578
See REVOCATION.		
<b>RESIDENCE:</b>		
requisites in regard to, in actions for divorce.....	128	32
proof of actual, required in actions for divorce.....	129	33
ib. ....	130	33
right of parent as regards, of child.....	213	46
right of husband to select.....	104	27
subsequent change of, does not affect will.....	1285	263
<b>RESIDUE:</b>		
remainder on, of estate .....	775	172
of testator's estate, effect of devise of.....	1332	271
of testator's estate, effect of bequest of.....	1333	271
<b>RESPONDENTIA:</b>		
defined.....	3036	516
owner may hypothecate by, in any case. ....	3037	517
master may hypothecate by, when.....	3038	517
law of bottomry applicable to.....	3039	517
obligation imposed upon ship owner by.....	3040	517
See BOTTOMRY; LIEN.		
<b>RESTORATION:</b>		
necessary on rescission of contract.....	1691	331
of thing wrongfully obtained.....	1712	336
ib. ....	1713	336
of deposit, terminates duties of depositary.....	1847	354
of thing found, exonerates finder.....	1871	358
lien extinguished by.....	2913	496
<b>RESTRAINT:</b>		
right of protection from bodily.....	43	11
of marriage, when void.....	710	163
ib. ....	1676	330
of alienation, when void.....	711	163
ib. ....	716	163
contract containing, on legal proceedings, void.....	1672	328
of trade, contract in, when void.....	1673	329
of trade, allowed on sale of good will.....	1674	329
of trade, allowed on dissolution of partnership.....	1675	329
of right of redemption from lien, not allowed.....	2889	493
<b>RETURN:</b>		
of appraisers of homestead .....	1263	258
of premium of insurance, when must be made.....	2617	456
ib. ....	2619	456
ib. ....	2620	457
ib. ....	2621	457
such, when excused.....	2618	457
<b>REVERSION:</b>		
of land granted to corporations.....	370	86
estate in, defined.....	768	171
owner of estate in, may sue for injury to inheritance.....	825	180

	Section.	Page.
<b>REVISION:</b>		
of contracts, when allowed.....	3399	576
presumption as to intent of parties.....	3400	577
principles of.....	3401	577
specific enforcement after.....	3402	577
<b>REVIVAL:</b>		
of obligation after extinction of negotiable instrument .....	3165	537
<b>REVOCACTION:</b>		
consent to separation is subject to.....	102	27
of condonation.....	121	20
power irrevocable, unless right of granted.....	592	190
grantor reserving power of, is deemed owner.....	923	194
of power of attorney, a real instrument.....	1092	223
of power of attorney, witness not necessary to its validity.....	1098	225
of gift in view of death.....	1151	235
of power of attorney, how only can be effected.....	1165	237
power of, when deemed executed.....	1229	251
ib.....	1230	251
of proposal to contract.....	1586	316
of proposal to contract, how made.....	1587	316
of trust.....	2280	410
of continuing guaranty.....	2815	484
<b>Of WILL:</b>		
procured by fraud, may be annulled.....	1272	261
of mutual will.....	1278	262
made in another State, valid.....	1283	263
void unless duly executed.....	1284	263
subsequent change of domicile does not affect.....	1285	263
in writing.....	1291	264
evidence of.....	1292	265
by obliteration.....	1293	265
of duplicate.....	1294	265
by subsequent will.....	1295	265
of subsequent, does not revive prior.....	1296	265
by marriage and birth of issue.....	1297	265
by marriage of testator.....	1298	266
by marriage of testatrix.....	1299	266
contract to sell property disposed of by will is not .....	1300	266
encumbrance on property is not.....	1301	266
conveyance, when is.....	1303	267
conveyance, when not.....	1302	266
revokes codicils.....	1304	267
provisions relating to, apply to what wills.....	1374	277
<b>RIGHTS:</b>		
two kinds of civil.....	8	3
may be waived, surrendered or lost.....	9	3
ib.....	3513	595
arising out of obligations, transferable.....	1458	294
must not be used injuriously.....	3514	596
<b>RIGHT OF WAY:</b>		
granted to corporations.....	366	86
limitation of such.....	367	86
selection of such, how certified to.....	371	87
as an easement.....	801	176
as a servitude .....	802	176
<b>BIOT:</b>		
involuntary deposit may be made in case of .....	1815	350
duty of depositary in such case.....	1816	351

	Section.	Page.
<b>RISKS:</b>		
insured against, to be stated in policy.....	2587	453
effect of altering thing covered by fire insurance, increasing..	2753	474
effect of altering thing covered by fire insurance, not increasing.....	2754	474
what, may be insured against in marine insurance.....	2655	461
stipulation of personal liability under bottomry independent of, void .....	3024	515
See INSURANCE.		
<b>RIVER:</b>		
ownership of land newly formed by action of.....	1014	756
See ACCRETION; ALLUVION.		
<b>ROAD CORPORATIONS:</b> See WAGON ROAD CORPORATIONS.		
<b>S</b>		
<b>SAILOR:</b>		
may make nuncupative will, when .....	1288	263
See SEAMEN.		
<b>SALARY:</b> See WAGES; COMPENSATION.		
<b>SALE:</b>		
defined .....	1721	338
of stock for delinquent assessments.....	341	79
highest bidder to be purchaser at such.....	342	79
when corporations may purchase at such.....	343	80
extension of time of delinquent .....	344	80
of franchise of corporations under executions.....	388	90
such not to affect powers of, of corporations.....	391	91
power of, in mortgage, when deemed part security .....	894	190
of personal property, owner of future interest in may compel.	947	199
transfer of personal property by .....	1186	233
what title to personal property passes by.....	1140	234
obligations of seller of personal property as to delivery (see DELIVERY).		
as to warranty (see WARRANTY).		
of homestead on execution.....	1243	254
rescission of, not effected by stoppage in transit.....	3080	523
power of, under mortgage, how executed.....	2927	498
of pledged property by pledgee, requisites previous to.....	3000	511
ib.....	3001	511
ib.....	3002	511
of pledged property, must be by auction.....	3005	512
of pledged property, on demand of pledgee.....	3007	512
of pledged property, surplus of, to whom paid.....	3008	512
ib.....	3009	513
judicial, of pledged property.....	3011	513
subject of, must be what.....	1722	338
factor may cause, for his reimbursement.....	2027	375
on credit by factor. ....	2028	378
liability of factor upon, under guaranty commission.....	2029	378
of delinquent mining property.....	2520	443
extinction of lien by.....	2910	496
power of, may be conferred by mortgage.....	2926	498
by depositary of deposit in danger of perishing .....	1837	353
of thing found.....	1869	357
ib.....	1870	357
rights and obligations of seller under (see SELLER).		
rights and obligations of buyer under (see BUYER).		

	Section.	Page.
<b>SALE: (Continued.)</b>		
<i>Agreement for:</i>		
defined .....	1726	338
to sell .....	1727	338
to buy .....	1728	338
to sell and buy .....	1729	339
what may be subject of.....	1730	339
of real property, effect of.....	1731	339
ib.....	1741	339
authority to agent to execute to be in writing.....	1732	339
form of grant required by.....	1733	339
ib.....	1734	339
ib.....	1735	340
of personal property.....	1739	341
must be in writing or partially performed.....	1741	341
not revocation of will .....	1300	266
<b>By Auction:</b>		
defined .....	1792	348
when complete.....	1793	348
withdrawal of bid.....	1794	348
written conditions of, not to be modified.....	1795	348
when absolute.....	1796	348
by-bidding at, a fraud.....	1797	348
auctioneer's memorandum of, binding.....	1798	349
See BUYER; SELLER; AUCTION: DELIVERY; WARRANTY.		
<b>SALVAGE:</b>		
in case of capture of ship, ratable deduction to be made from seamen's wages for.....	2060	383
who entitled to.....	2079	385
ib.....	2725	470
<b>SAMPLE:</b>		
implied warranty on sale by.....	1766	344
<b>SATISFACTION:</b>		
of judgment against corporations.....	388	90
of judgment against homestead, how made.....	1243	254
of legacies and gifts.....	1367	276
what operates as.....	1523	304
ib.....	1524	304
completed novation operates as.....	1534	306
of recorded real mortgage, how evidenced .....	2948	502
ib.....	2949	502
ib.....	2950	502
ib.....	2951	503
penalty for refusing to acknowledge, of personal mortgage....	2951	503
See Accord.		
<b>SAVINGS AND LOAN CORPORATIONS:</b>		
may be formed.....	286	61
may loan money, on what terms ....	571	132
capital stock and rights and privileges thereof.....	572	133
dividends to be from surplus.....	573	133
to contract no liability except for deposits.....	573	133
property which may be owned by, and disposal of such.....	574	134
restrictions on purchasers.....	574	134
married women and minors may own stock in .....	575	135
may issue transferable certificates of deposit.....	576	135
special certificates.....	576	135
to provide reserve fund for payment of losses .....	577	135
prohibition on officer of, and what vacates his office.....	578	136

	Section.	Page.
<b>SCIENCE:</b>		
corporations for promotion of, may be formed.....	286	61
<b>SEA:</b>		
perils of, defined.....	2199	399
perils of, carrier not liable for damage caused by.....	2197	399
See CARRIER, MARINE; INSURANCE, MARINE.		
<b>SEAL:</b>		
defined.....	3589	608
private, abolished.....	1096	225
ib.....	1629	323
officer taking proof or acknowledgment of instrument, must affix.....	1191	244
corporate or official, how affixed.....	1628	323
<b>SEAMEN:</b>		
defined.....	2049	381
may make nuncupative will, when.....	1288	263
power of shipmaster over.....	2037	379
how engaged.....	2050	381
how discharged.....	2050	381
cannot be compelled to ship on unseaworthy vessel.....	2051	381
restrictions on contracts with.....	2053	381
lien of.....	3064	521
wages of, when begin.....	2055	382
wages of, when depend on freightage.....	2054	382
wages of, when do not depend on freightage.....	2058	382
wages of, not lost by agreement.....	2051	381
wages of, where voyage is broken up.....	2056	382
wages of, when wrongfully discharged.....	2057	382
wages of, not lost by wreck.....	2058	382
wages of, when prevented from rendering service.....	2060	383
wages of, when personal representatives take.....	2062	383
wages of, when forfeited.....	2063	383
must be provided for in sickness.....	2061	383
must not ship goods on his own account.....	2064	383
liability of, for injury to ship.....	2063	383
<b>SEAWORTHINESS:</b>		
seamen not bound to sail when reasonable doubt exists as to, of ship.....	2051	381
defined.....	2632	464
implied warranty of, in insurance.....	2681	464
at what time must exist, under insurance.....	2683	464
what required to constitute.....	2684	464
different degrees of, during voyage.....	2685	465
for the purpose of insuring cargo.....	2687	465
<b>SECRETARY OF STATE:</b>		
proceedings for continuance of corporation to be filed with... prerequisites to be required by, before issuing certificate of incorporation.....	287	63
when must issue certificate of incorporation.....	294	66
when must issue certificate of incorporation.....	297	66
<b>SECURITY:</b>		
for alimony.....	140	35
when power of sale in mortgage deemed part.....	894	190
indorser having, not entitled to notice of dishonor.....	3157	535
to be given by assignee for benefit of creditors.....	3467	589
contracts of, when called bail.....	2780	478
held by creditor or co-surety, surety entitled to benefit of.....	2849	488
held by surety, creditor entitled to benefit of.....	2854	489
by way of lien (see LIEN).....	2872	491

	Section.	Page.
<b>SECURITY: (Continued.)</b>		
for what lien may be.....	2884	493
for obligation does not prevent direct enforcement.....	2890	493
by way of mortgage (see MORTGAGE).....	2919	497
transfer by way of, to be deemed mortgage or pledge.....	2921	497
of mortgages not to be impaired by person bound.....	2932	499
by way of pledge (see PLEDGE).....	2986	508
for third person, pledge may be made as.....	2992	510
by way of bottomry (see BOTTOMRY).....	3017	514
by way of respondentia (see RESPONDENTIA).....	3036	517
See BOND; SURETY; SURETYSHIP.		
<b>SEDUCTION:</b>		
right of protection from.....	48	13
damages for.....	3339	565
<b>SEISIN:</b>		
executory contract of sale binds seller to insert covenant of...	1734	339
damages for breach of covenant of.....	3306	558
See COVENANTS.		
<b>SELECTION:</b>		
power in trust with right of.....	983	197
owner of materials in confusion of goods has right of, between the thing and its value.....	1032	215
between alternatives, who has right of.....	1448	292
between alternatives, notice of, must be given.....	1449	293
between alternatives, extent of right of.....	1450	293
See OPTION.		
<b>SELF-DEFENCE:</b>		
right of.....	43	11
<b>SELLER:</b>		
of good will, may agree not to carry on the same business in the county.....	1674	329
in an executory contract of sale, bound to insert certain covenants.....	1734	339
rights and obligations of.....	1748	342
as depositary before delivery.....	1748	342
in respect to re-sale or rescission.....	1749	342
authority of auctioneer from.....	2362	421
of real property, lien of.....	3047	518
when lien of, of real property, deemed waived.....	3047	518
extent of lien of, of real property.....	3049	518
of personal property.....	3049	518
<i>Obligations of, as to delivery:</i>		
on demand.....	1753	342
where made.....	1754	342
expense of transportation.....	1755	342
when to be made.....	1758	343
notice of election.....	1756	343
must follow directions of buyer.....	1757	343
of personal property.....	1759	343
<i>Obligations of, as to warranty:</i>		
warranty defined.....	1763	344
not implied.....	1764	344
of title to personal property.....	1765	344
on sale by sample.....	1766	344
of merchandise not in existence.....	1768	345
of manufacture against latent defects.....	1769	345
of manufacture for particular purpose.....	1770	345
when thing cannot be examined by buyer.....	1771	345
of trade marks.....	1772	346



	Section.	Page.
<b>SELLER: (Continued.)</b>		
other marks.....	1773	346
on sale of written instrument.....	1774	346
of provisions for domestic use.....	1775	346
on sale of good will.....	1776	347
on judicial sale.....	1777	347
effect of general warranty.....	1778	347
See GRANTOR; SALE; VENDOR.		
<b>SEPARATION:</b>		
of husband and wife by consent, not desertion.....	99	26
and intent to desert do not always co-exist.....	101	27
consent to, revocable.....	102	27
husband and wife may agree to immediate.....	159	58
mutual consent to, sufficient consideration.....	160	58
See DIVORCE; HUSBAND AND WIFE.		
<b>SERVANT:</b>		
abduction or enticement of, forbidden.....	48	13
injury to, forbidden.....	48	13
relation of master and.....	264	54
defined.....	2009	376
term of hiring.....	2010	376
ib.....	2011	376
renewal of hiring.....	2012	376
time of service of.....	2013	376
to deliver over to master without demand.....	2014	377
master may discharge.....	2015	377
See APPRENTICE; EMPLOYÉ; SERVICE.		
<b>SERVICE:</b>		
of legitimate unmarried minor, father entitled to.....	197	43
of illegitimate unmarried minor, mother entitled to.....	200	44
parent may relinquish, of child.....	211	45
when apprentice may recover for.....	276	57
of apprentice, how enforced.....	278	57
of depository.....	1839	354
contract for, cannot be specifically enforced.....	3390	576
debt for, may be preferred in assignment for benefit of cred- itors.....	3453	586
employé in gratuitous, duties of.....	1975	370
gratuitous, when may be relinquished.....	1976	370
without employment.....	2078	384
ib.....	2079	385
of carrier, other than carriage.....	2203	400
See EMPLOYMENT; EMPLOYÉ; SERVANT.		
<b>SERVIENT TENEMENT:</b>		
defined.....	803	177
servitude on, by whom only may be created.....	804	177
owner of, cannot hold servitude thereon.....	805	177
owner of, may have action for recovery of possession.....	810	177
servitude extinguished by destruction of.....	811	177
<b>SERVITUDES:</b>		
upon land, when called easements.....	801	176
when may be held apart from the land.....	802	176
by whom grantable.....	804	177
by whom may be held.....	805	177
extent of, how determined.....	806	177
partition of burden of.....	807	177
how far usable by expectant owner.....	808	177
who may enforce by action.....	809	177
do not disqualify owner from recovering possession.....	810	177

	Section.	Page.
<b>SERVITUDES: (Continued.)</b>		
how extinguished.....	811	178
instrument granting, a real instrument.....	1092	223
instrument granting, witness not necessary to its validity.....	1098	225
<b>SEVERAL:</b>		
defined .....	3571	605
obligation may be.....	1427	290
obligation, when presumed not to be.....	1428	290
indemnity to, extends to each .....	2776	476
See <b>JOINT</b> .		
<b>SHERIFF:</b>		
deed of, does not carry "subsequently acquired title".....	1122	231
grant of, and encumbrances, muniments of same title.....	1210	248
grant of, subject to provisions of chapter on <i>Recording</i> .....	1211	248
duties of, on sale of delinquent mining property.....	2520	443
lien of.....	3065	521
<b>SHIP:</b>		
defined.....	960	200
appurtenances of.....	961	201
foreign .....	962	201
domestic .....	962	201
controversy between part owners of, how determined.....	964	201
who responsible for repair and supplies of.....	965	201
registry, enrolment and license of.....	966	201
collision between, from breach of rules.....	971	203
losses caused by collision of, how apportioned.....	973	203
transfer of interest in, to be in writing.....	1135	233
recording transfer of, where provided for.....	1221	250
when not seaworthy, seamen need not sail in.....	2051	381
seaworthiness of, defined.....	2682	464
charter party of, defined and regulated.....	1959	368
laws of mortgage do not apply to.....	2978	508
lien on.....	3069	522
hypothecation of, under bottomry.....	3017	514
shipmaster may procure repairs and supplies of.....	2376	423
shipmaster may hypothecate, when.....	2377	423
shipmaster may sell, when.....	2378	424
abandonment of, terminates master's power .....	2381	424
shipmaster personally liable for certain contracts for .....	2382	424
liability of master for negligence of persons employed on....	2383	424
part owners of, not partners.....	2396	426
See <b>BOTTOMRY; ABANDONMENT; VOYAGE; SHIPMASTER; INSURANCE, MARINE; SHIP'S MANAGER; SHIP OWNERS.</b>		
<b>SHIPMASTER:</b>		
may be charterer.....	1959	368
how appointed.....	2034	379
must be on board, when.....	2036	379
must take pilot, when.....	2036	379
power of, over seamen.....	2037	379
power of, over passengers.....	2038	379
power of, to impress private stores.....	2039	379
must not abandon ship without advice.....	2040	380
duties of, on abandoning ship.....	2041	380
when must not trade on his own account.....	2042	380
care and diligence required of.....	2043	380
authority of, necessary to make jettison.....	2150	393
is general agent for owner.....	2373	423
may borrow on credit of owner.....	2374	423
may borrow on behalf of owner of cargo.....	2375	423

	Section.	Page.
<b>SHIPMASTER : (Continued.)</b>		
power of, to make contracts.....	2376	423
power of, to hypothecate.....	2377	424
power of, to sell ship.....	2378	424
power of, to sell cargo.....	2379	424
authority of, to ransom ship.....	2380	424
power of, terminates on abandonment of ship.....	2381	424
personal liability for contract concerning ship.....	2382	424
liability for acts of persons employed about ships.....	2383	424
responsibility of, for negligence of pilot.....	2384	424
when may hypothecate ship under bottomry.....	3019	515
ib.....	3020	515
when may hypothecate freightage under bottomry.....	3021	515
lien of.....	3036	521
<b>SHIP OWNERS :</b>		
controversy between, how determined.....	962	201
master of ship appointed by.....	2035	379
when manager, called what.....	2070	384
when manager, not entitled to compensation.....	2072	384
shipmaster general agent for.....	2373	423
shipmaster may borrow on credit of.....	2374	423
certain contracts of shipmaster bind.....	2376	423
shipmaster may sell ship without instructions from, when.....	2378	424
contract to ransom ship, by shipmaster, binds.....	2380	424
power of, to bind, when ceases.....	2381	424
when responsible for negligence of ship.....	2384	424
ship's manager cannot bind, to an insurance.....	2389	425
has insurable interest.....	2659	461
value of insurable interest of.....	2661	461
have insurable interest in expected freightage.....	2662	461
may hypothecate ship upon bottomry.....	3018	515
when must repay owner of cargo hypothecated under respon- dents.....	3040	517
<b>SHIP'S MANAGER :</b>		
defined.....	2070	384
duties of.....	2071	384
not entitled to compensation, when.....	2072	384
powers of.....	2388	425
limitation of powers of.....	2389	425
<b>SHIPWRECK :</b>		
involuntary deposit may be made in case of.....	1815	350
duty of depositary in such case.....	1816	351
wages of seamen not lost by.....	2058	382
See ABANDONMENT ; Loss.		
<b>SIGNATURE :</b>		
defined.....	3585	607
proof of, how made in certain cases.....	1188	244
of officer to be affixed to certificate of proof or acknowledg- ment.....	1191	244
in indorsement of negotiable instrument.....	3109	527
ib.....	3110	527
See WRITING.		
<b>SINGULAR NUMBER :</b>		
includes plural.....	3583	607
plural number includes.....	3583	607
<b>SISTER :</b>		
right of protection from seduction of.....	48	13

	Section.	Page.
<b>SKILL:</b>		
minor may hold offices requiring only diligence and.....	27	8
liability for injury arising from want of ordinary.....	1714	336
borrower for use must exercise what.....	1888	359
employé must use reasonable.....	1983	372
employé must use all that he possesses .....	1984	372
voluntary depository must use reasonable.....	2078	384
carriers of persons for reward must use reasonable.....	2100	387
See CARE; DILIGENCE.		
<b>SLANDER:</b>		
defamation effected by.....	44	11
defined.....	46	12
<b>SOLE TRADER:</b>		
rights of married woman as.....	188	42
<b>SOLDIER:</b>		
in active service may make nuncupative will .....	1288	264
<b>SOLEMNIZATION OF MARRIAGE:</b>		
changes status of minors to that of adults.....	20	8
consent must be followed by, in order to constitute marriage...	55	16
how effected.....	68	19
by whom effected.....	70	20
no particular form of, required.....	71	20
substantial requisites of.....	72	20
certificate on .....	73	20
persons married without, must make declaration, how .....	75	21
See MARRIAGE.		
<b>SOUTHERLY:</b>		
defined.....	1074	221
<b>SPECIFIC PERFORMANCE:</b>		
of obligations may be compelled, when.....	3384	572
right to mutual.....	3385	573
not enforced unless mutual.....	3386	574
presumption in favor of, as to real property .....	3387	574
presumption against, as to personal property.. ..	3388	574
may be enforced in favor of party not bound, when.....	3388	574
may be enforced, notwithstanding penalty in contract.....	3389	574
not enforced in respect of personal service.....	3390	575
not enforced in respect of contract to accept arbitration.....	3390	575
not enforced in respect of act which party cannot perform....	3390	575
not enforced in respect of agreement to procure act of third person .....	3390	575
not enforced in respect of indefinite contract.....	3390	575
not enforced against party not having adequate consideration	3391	575
not enforced against party as to whom contract is not fair....	3391	575
not enforced against party not freely consenting.....	3391	575
not enforced in favor of party in default.....	3392	575
not enforced when oppressive .....	3393	575
of agreement to buy, not enforced when title doubtful.....	3394	576
may be enforced against persons claiming under party bound to perform .....	3395	576
of trust power, may be compelled.....	3402	196
may be enforced after revision.....	3402	577
<b>SPECIFIC RELIEF:</b>		
to be given only in special cases.....	3366	569
how given.....	3367	569
not given to enforce penalties.....	3369	570
See SPECIFIC PERFORMANCE.		

# INDEX.

763

	Section.	Page.
<b>SPEED:</b>		
carrier must travel at what rate of .....	2104	387
<b>SPORTS:</b>		
right of conducting lawful, on land, an easement.....	801	176
<b>SPRING:</b>		
natural flow of, not to be prevented.....	817	178
<b>STAGE COMPANIES:</b>		
may be formed.....	286	61
articles of incorporation must state what additional facts.....	291	65
prerequisites to filing articles of incorporation.....	292	65
<b>STATE:</b>		
defined .....	3590	608
persons made adults by laws of another, how deemed in this..	22	8
persons made minors by laws of another, how deemed in this..	23	8
marriages contracted without this.....	64	19
lands of, granted to corporations.....	366	86
ib.....	367	86
appurtenances to lands of, granted to corporations .....	368	86
lands so granted, when to revert to.....	370	86
may hold property as private proprietor.....	669	157
is owner of what property.....	670	157
ib.....	1016	213
<b>STATUTES:</b>		
defined.....	4	2
minor cannot disaffirm contract entered into by virtue of special.....	31	9
curing defective acknowledgments, etc., preserved.....	1196	246
repeal of former.....	3591	608
<b>STEAMERS:</b>		
rules for navigation of.....	970	202
ib .....	Nota.	204
See SHIP.		
<b>STOCK (OF CORPORATIONS):</b>		
amount to be subscribed before incorporating.....	292	65
oath of officer to subscription of.....	294	66
majority of subscribed, necessary to adoption of by-laws.....	302	68
majority of subscribed, necessary to election of Directors.....	303	68
ib.....	307	69
two-thirds of subscribed, necessary to amend by-laws .....	304	68
two-thirds of subscribed, necessary to removal of officers.....	309	70
majority of subscribed, constitutes quorum.....	311	71
dividends not to be made from capital .....	315	72
debts not to be incurred beyond subscribed.....	315	72
ib.....	327	76
capital must not be increased or diminished except.....	315	72
ib.....	361	84
on dissolution, may be divided.....	315	72
who may enforce subscription .....	321	74
certificates of, how issued.....	323	74
transfer of shares of. ....	325	75
transfer of shares of, held by married women.....	325	75
transfer of shares of, of non-residents.....	326	75
hypothecated shares of, how voted .....	312	74
ib.....	322	79
sale of delinquent.....	323	79
when acquires jurisdiction over certain.....	340	79
may buy its own, when.....	343	80

	Section.	Page.
<b>STOCK (OF CORPORATIONS):</b> ( <i>Continued.</i> )		
disposition of, where corporation is purchaser.....	344	80
when corporation may purchase delinquent.....	341	79
ib.....	342	79
disposition of delinquent, purchased by corporation.....	343	80
ib.....	344	80
action for recovery of, sold for delinquent assessments.....	347	81
liability of stockholders on... ..	357	88
defined.....	407	93
See ASSESSMENT OF STOCK.		
<b>STOCKHOLDERS (IN CORPORATIONS):</b>		
entitled to how many votes.....	302	68
notice to be given to, of meetings.....	307	69
who has hypothecated stock, when may vote.....	312	71
ib.....	322	74
liability of, for debts of corporation.....	322	74
ib.....	357	83
defined.....	407	93
<b>STOPPAGE IN TRANSIT:</b>		
right of, who may exercise.....	3076	522
when may be exercised.....	3078	522
how effected.....	3079	523
does not rescind sale.....	3080	523
<b>STORAGE:</b>		
defined.....	1851	355
degree of care required of depositary.....	1852	355
compensation of depositary.....	1853	355
how terminated.....	1854	355
ib.....	1855	355
finder may put thing found on.....	1868	357
when carrier may place freight on.....	2121	389
ib.....	2122	389
<b>STRANGER:</b>		
grant may inure to benefit of.....	1085	222
attornment to, void.....	1128	223
See THIRD PERSON.		
<b>STREAM:</b>		
cannot be polluted or interrupted by owner of soil.....	817	179
ownership of land newly formed by action of.....	1014	212
ownership of land newly formed in navigable.....	1016	213
ownership of land newly formed in unnavigable.....	1017	213
ownership of islands formed by division of.....	1018	213
ownership of abandoned bed of.....	1019	213
<b>STREET RAILROAD CORPORATIONS:</b> See RAILROAD CORPORATIONS.		
<b>SUB-AGENT:</b>		
not responsible to agent's principal.....	2022	377
when agent responsible to principal for.....	2350	420
when not.....	2351	420
See AGENT.		
<b>SUBROGATION:</b>		
right of inferior lienor to.....	2904	495
<b>SUBPOENA:</b>		
officer taking acknowledgment may issue.....	1190	244

	Section.	Page.
<b>SUBSCRIPTION:</b>		
to stock of corporations.....	292	65
ib.....	293	65
amount of, to be paid in before filing articles of incorporation	291	65
ib.....	293	65
oath of officer as regards.....	294	66
payment of, how enforced.....	321	74
See STOCK.		
<b>SUBSEQUENT CONDITIONS: See CONDITIONS, SUBSEQUENT.</b>		
<b>SUBSEQUENTLY ACQUIRED TITLE:</b>		
passes by operation of law.....	1078	222
ib.....	1122	231
passes by will.....	1311	268
passes by mortgage.....	2945	501
does not pass by Sheriff's deed.....	1122	231
<b>SUBSTITUTE:</b>		
responsibility of employé for.....	1989	373
<b>SUBSTITUTION: See NOVATION.</b>		
<b>SUCCESSION:</b>		
rights of children of annulled marriage to.....	84	23
alien taking by, when must assert his claim.....	672	158
posthumous children take by.....	698	161
future interest may pass by.....	699	161
words of, unnecessary to pass a fee.....	1076	221
liability of persons acquiring property by.....	1127	232
child of testator born after making of will takes by.....	1305	267
child of testator unprovided for by will takes by, when.....	1306	267
defined.....	1384	278
both real and personal property pass by.....	1385	279
to whom property passes by.....	1385	279
distribution of property received by.....	1386	279
illegitimate child takes what property by.....	1387	281
mother of illegitimate child to take by.....	1388	282
computation of degrees in determining.....	1389	282
exclusion from, by advancement.....	1391	282
relatives of half-blood, when to take by.....	1389	282
husband takes common property by, on death of wife.....	1396	283
husband and wife, divorced and in fault, not to take by.....	1396	283
wife takes one-half of common property by, on death of husband.....	1397	283
by representation.....	1398	284
aliens may take by.....	1399	284
when State takes by.....	1400	284
ib.....	1401	285
when State takes by, subject to charges.....	1402	285
persons taking by, liable for debts of decedent.....	1403	285
change of interest by, does not affect insurance.....	2556	448
mortgaged property passing by, mortgage, how satisfied.....	2940	501
<b>SUCCESSORS:</b>		
of decedent may dispute legitimacy of issue.....	195	43
liable for obligations of decedent.....	1403	285
in equal degree take equally.....	1389	282
of employer, when must compensate employé.....	1998	374
duty of trustee as to appointment of his.....	2260	408
must satisfy mortgage on property passing to.....	2940	501
See PERSONAL REPRESENTATIVES; SUCCESSION.		

	Section.	Page.
<b>SUGGESTIONS:</b>		
false, when fraudulent.....	1572	312
ib.....	1710	335
See REPRESENTATION.		
<b>SUMMONS:</b>		
divorce not to be granted till proof of actual service of.....	130	33
<b>SUPERFLUITY:</b>		
does not vitiate.....	3537	599
See AMBIGUITY; INTERPRETATION.		
<b>SUPERHUMAN CAUSE:</b>		
excuses non-performance.....	1511	302
innkeeper not responsible for.....	1859	356
carrier not responsible for.....	2194	399
no one responsible for.....	3526	597
<b>SUPERVISORS:</b>		
may bring action in behalf of child, for parental abuse.....	203	44
may claim provision for support of orphan out of property of		
intestate parent.....	265	44
may give consent to apprenticeship of child, when.....	265	54
may bind out as apprentices.....	268	55
<b>SUPPORT TO LAND:</b>		
right of more than natural, may be held as an easement.....	801	176
right of coterminous owners to lateral and subjacent.....	832	181
<b>SUPPRESSION:</b>		
of facts, when fraudulent.....	1572	312
ib.....	1710	335
See CONCEALMENT.		
<b>SUPREME COURT:</b>		
Clerk or Justice of, may take acknowledgments.....	1171	335
See COURT.		
<b>SURETY:</b>		
defined.....	2831	485
apparent principal may show that he is.....	2832	486
liability of, cannot exceed terms of contract.....	2836	487
liability of, not altered by judgment against principal.....	2838	487
liability of, discharged by offer to perform principal obligation	2839	487
interpretation of contract of.....		
how exonerated.....	2838	487
ib.....	2845	488
rights of.....		
rights of, same as guarantor's.....	2844	488
rights of, to compel creditors to sue, etc.....	2845	488
rights of, to compel principal to perform.....	2846	488
rights of, to compel principal to repay him.....	2847	488
rights of, to compel co-sureties to contribute.....	2848	488
rights of, to enforce remedies of creditor against principal.....	2848	488
rights of, to benefit of securities held by creditor or co-surety	2849	488
rights of, to have principal's property taken first.....	2850	488
rights of creditor against.....	2855	489
release of principal releases.....	1543	307
ib.....	2819	484
indemnitor, how far entitled to rights of.....	2779	477
indorser for accommodation has rights of.....	3122	539
when person indemnifying is.....	2779	477
See GUARANTY; LETTER OF CREDIT.		



	Section.	Page.
<b>SURETYSHIP:</b>		
contract of, defined.....	2831	485
how interpreted.....	2837	487
See SURETY; GUARANTY; LETTER OF CREDIT.		
<b>SURPRISE:</b>		
contract made by, not specifically enforced.....	3390	575
See MISTAKE.		
<b>SURRENDER:</b>		
of private rights allowed.....	9	3
of grant to grantor, does not operate as retransfer.....	1060	219
owner may be exonerated from claim of finder by, of thing found.....	1871	358
lender may be exonerated from claim of borrower by, of thing lent.....	1892	360
of negotiable instrument, when may be required.....	3137	532
<b>SURVEYOR-GENERAL:</b>		
selection of right of way by corporations to be submitted to...	371	87
<b>SUSPENSION:</b>		
of existence of corporations.....	288	64
of power of alienation.....	770	171
ib.....	771	172
ib.....	715	163
ib.....	733	165
computation of term of, in execution of power.....	912	193
of policy of insurance by transfer of thing insured.....	2593	453
<b>T</b>		
<b>TAIL:</b>		
estates in, abolished.....	763	170
<b>TECHNICAL WORDS:</b>		
how interpreted in a will.....	1327	270
not necessary to give effect in will.....	1328	271
how interpreted in a contract.....	1645	325
See INTERPRETATION.		
<b>TAXES:</b>		
owner of estate for life must pay.....	840	181
included in word "encumbrances".....	1114	230
covenant for payment of, runs with the land.....	1463	295
<b>TELEGRAPH:</b>		
carrier by, must use utmost care.....	2162	394
common carrier by, must transmit messages, in what order....	2207	400
<b>TELEGRAPH CORPORATIONS:</b>		
may be formed.....	286	61
articles of incorporation must state what additional facts.....	291	65
prerequisites to filing articles of incorporation.....	292	65
right of way along water, roads and highways.....	536	125
liability for injuring telegraph property.....	537	126
liability for malicious injury to property.....	538	126
conditions on which damages to sub-aqueous cable may be recovered.....	539	126
duty to send dispatch.....	540	126
may dispose of certain rights.....	541	127
rates of charges to be fixed and published.....	542	127

	Section.	Page.
<b>TENANT:</b>		
husband and wife may hold property as joint, or in common.....	161	38
for life, heirs of, when take as purchasers.....	780	173
at will, how required to quit.....	788	174
notice by, of intent to quit.....	791	175
damages for, wilful holding over.....	3344	566
ib.....	3345	566
for life, rights of.....	818	179
for years or at will, rights of.....	819	179
ib.....	820	179
attornment by, when unnecessary.....	1126	232
attornment by, when void.....	1128	233
payment of rent by, to grantor, when binding on grantee.....	1126	232
when several devisees take as, in common ..	1350	273
may repair at expense of landlord, when.....	1942	366
continued possession of, when renews lease.....	1945	366
must give notice to landlord of adverse proceeding.....	1948	367
when rent payable by.....	1947	367
of part room, entitled to whole.....	1949	367
released from rent by letting room in parts.....	1949	367
See LANDLORD.		
<b>TESTAMENT: See WILL.</b>		
<b>TESTATOR:</b>		
must subscribe will.....	1276	261
mutual or conjoint will may be revoked by any.....	1278	262
how may revoke will.....	1291	264
effect of marriage on will of.....	1297	265
ib.....	1298	266
ib.....	1299	266
child born after death of, to succeed.....	1305	267
children of, unprovided for in will, may succeed.....	1306	267
title subsequently acquired by, pass by will of. ....	1311	268
property of, how disposed of in payment of debt.....	1359	275
See WILL; DEVISE; BEQUEST; LEGACY.		
<b>TESTIMONY:</b>		
of witness, when privileged.....	47	13
divorce not to be granted on uncorroborated.....	132	34
perjury, may be heard to explain ambiguity in grant.....	1669	223
See EVIDENCE.		
<b>THEATRE CORPORATIONS:</b>		
may be formed.....	286	61
See CORPORATIONS.		
<b>THING IN ACTION:</b>		
defined.....	953	200
transfer of and survivorship in.....	954	200
value of, how determined in assessing damages.....	3356	568
<b>THIRD PERSON:</b>		
defined.....	3572	605
when may recover for necessities furnished child.....	208	45
when may not recover for necessities furnished child.....	209	45
estates for life of.....	766	171
remainder on estates for life of.....	775	173
ib.....	776	173
effect of transfer where consideration is paid by.....	853	183
consent of, to execution of power, how given.....	907	192
delivery in escrow must be made to.....	1059	219
grant may inure to benefit of.....	1085	222
may enforce contract made for his own benefit.....	1559	310

# INDEX.

769

	Section.	Page.
<b>THIRD PERSON: (Continued.)</b>		
when voluntary trustee.....	2243	406
when must see to application of trust property .....	2244	406
trusts for benefit of.....	2250	407
ratification to prejudice of, not allowed.....	2313	415
responsibility of agent to.....	2343	419
agent must deliver thing held for principal to, when.....	2344	420
liability of partner to.....	2442	431
who liable as partner to.....	2444	431
information of belief of, material in marine insurance.....	2670	462
property may be pledged for benefit of.....	2992	510
contract to procure act to be done by, not specifically enforced	3390	575
rights of, not to be prejudiced by revision of contract, when..	3399	576
act of, not to prejudice.....	3520	596
who must suffer by act of.....	3543	600
<b>THREAT:</b>		
desertion caused by, how operates as a ground of divorce.....	98	26
trustee must not use, to obtain advantage.....	2228	404
partner must not use, to obtain advantage.....	2411	427
See DURESS; MENACE; UNDUE INFLUENCE.		
<b>TICKET:</b>		
to passenger, effect of.....	2179	396
<b>TIME:</b>		
of commencing action for nullity of marriage.....	84	23
of creation of interest, what.....	749	167
of delivery of grant, presumption of. ....	1055	218
words in will, relate to what.....	1336	272
at which obligation must be performed.....	1490	299
ib.....	1491	299
not of essence, unless expressly declared.....	1492	299
ib.....	1658	327
of performance of contract.....	1657	327
of performance of contract, may be extended.....	1698	332
entire, of servant, belongs to master.....	2013	376
to which representation in insurance refers.....	2577	451
allowed for travelling to record personal mortgage.....	2966	506
does not confirm a void act.....	3539	599
See LAPSE OF TIME.		
<b>TITLE:</b>		
of Act establishing the Code.....	1	1
filing inventory of wife's property gives notice of her.....	172	39
ownership of instruments affecting.....	994	209
of property, how acquired.....	1000	211
by occupancy.....	1006	211
by accession.....	1013	212
by transfer .....	1039	216
re-delivery of grant to grantor does not re-vest.....	1060	219
fee simple, when presumed to pass.....	1077	221
ib.....	1121	231
subsequently acquired, passes by operation of law.....	1078	222
subsequently acquired, passes by will.....	1311	268
what, passes by transfer.....	1082	222
ib.....	1122	231
to highway, passes by transfer.....	1125	232
to personal property, what passes by transfer.....	1140	234
transfer of, under executory agreement of sale.....	1141	234
when buyer acquires better, than settler has.....	1142	234
instruments evidencing, declared by judgment, how acknowl-		
edged for record.....	1161	236

	Section.	Page.
<b>TITLE:</b> ( <i>Continued.</i> )		
Sheriff's grant and encumbrances, muniments of same.....	1210	248
what, vests by homestead declaration.....	1254	257
to homestead, how recorded.....	1264	259
by devise by will.....	1310	268
when, passes by specific devise or legacy.....	1363	276
to thing in performance, when passes to creditor.....	1502	301
warranty of, to personal property.....	1765	344
loan for use does not transfer.....	1885	359
loan for exchange transfers.....	1904	361
to freight, by transfer of bill of lading.....	2127	390
ib.....	2128	390
implied warranty of, to personal property, in authority to agent to sell.....	2323	417
lien does not transfer.....	2888	493
subsequently acquired, inures to mortgagee.....	2945	501
<b>TITLE DEEDS:</b>		
ownership of.....	994	209
<b>TOLLS:</b>		
wagon road corporations may collect.....	514	122
penalty for taking unlawful.....	514	122
not to be charged on public highways.....	515	122
rates of, to be posted over gate.....	516	122
toll-gatherer may detain person until, paid.....	517	122
toll-gatherer not to detain person unnecessarily.....	518	122
penalty for avoiding.....	519	123
right of taking, may be held as a servitude.....	802	176
<b>TRADE:</b>		
contract restraining, how far allowed.....	1673	329
ib.....	1674	329
ib.....	1675	329
See BUSINESS.		
<b>TRADE MARKS:</b>		
subjects of ownership.....	655	155
what may be appropriated as.....	991	209
implied warranty of.....	1772	346
See MARKS.		
<b>TRANSFER:</b>		
of services and custody of child, how only can be effected....	197	43
of stock, how effected.....	324	75
of stock of married woman, how effected.....	325	75
of stock of non-resident, how effected.....	326	75
future interests may pass by.....	699	161
effect of, where consideration is paid by third person.....	853	183
effect of omitting to declare trust in.....	869	186
thing in action subject to.....	954	200
product of the mind subject to.....	982	203
defined.....	1039	216
voluntary, defined.....	1040	216
voluntary, consideration not necessary to its validity (see GIFT).....	1040	216
what may be subject of.....	1044	217
mere possibility not subject of.....	1045	217
right of re-entry subject of.....	1046	217
adverse claim subject of.....	1047	217
agreement not to transfer insured interest, when void.....	2599	454
life insurance policy may pass by.....	2764	475
of thing insured does not transfer policy.....	2593	453
of interest in partnership property dissolves partnership.....	2450	432

	Section.	Page.
<b>TRANSFER: (Continued.)</b>		
of interest, when deemed mortgage.....	2921	497
under mortgage subject to defeasance, may be proved.....	2923	498
<i>Mode of:</i>		
oral.....	1051	217
by grant (see GRANT) .....	1052	218
<i>Effect of:</i>		
to vest title in transferee.....	1082	222
upon interests of other parties.....	1083	222
upon incidents of things transferred .....	1084	222
in favor of stranger.. ..	1085	222
of personal property by sale.....	1140	234
<i>Unlawful and Fraudulent:</i>		
certain instruments void against purchasers.....	1227	251
not void against purchasers having notice, unless fraud is mutual .....	1228	251
power to revoke, when deemed executed.....	1229	251
ib.....	1230	251
other provisions concerning.....	1231	252
certain presumed to be.....	3440	583
when creditor can avoid.....	3442	583
question of fraud in respect to, a question of fact.....	3443	583
<b>OF OBLIGATIONS:</b>		
burden, when transferable .....	1457	293
right arising out of obligation.....	1458	294
of obligation running with the land.....	1460	294
See COVENANTS.		
<b>OF REAL PROPERTY:</b>		
requisites for .....	191	223
instrument affecting.....	1092	223
See GRANT.		
<b>OF PERSONAL PROPERTY:</b>		
when must be in writing.....	1135	233
by sale.....	1136	233
of title under sale.....	1140	234
under executory agreement.....	1141	234
effect of, under sale.....	1142	234
See GIFTS.		
<b>TRANSIT:</b>		
mortgaged property in, where deemed located.....	2967	506
stoppage in.....	3076	522
stoppage in, how effected.....	3079	523
stoppage in, effect of.....	3080	523
<b>TRANSPORTATION: See CARRIAGE.</b>		
<b>TREES:</b>		
ownership of.....	833	181
ib.....	834	181
nursery, subject to mortgage.....	2958	504
damages for injury to.....	3347	566
<b>TRESPASS:</b>		
gives trespasser no title to property.....	1031	216
damages for.....	3346	566
<b>TRIFLES:</b>		
law disregards.....	3533	598
<b>TRUST:</b>		
minor cannot hold offices of.....	27	9
suspension of power to alienate subject of.....	771	172
powers in (see POWERS).		

	Section.	Page.
<b>TRUST: (Continued.)</b>		
instrument declaring, a "real instrument".....	1092	223
witness not necessary to validity of instrument declaring.....	1093	223
interest in existing, how transferred.....	1135	233
voluntary, defined.....	2216	402
involuntary, defined.....	2217	402
parties to, defined.....	2218	402
for what object may be created.....	2220	403
who deemed trustee under.....	2219	403
voluntary, how created as to trustor.....	2221	403
voluntary, how created as to trustee.....	2222	403
obligations of trustee under (see TRUSTEE).		
obligations of trustor under (see TRUSTOR).		
obligations of third persons in respect to.....	2243	406
third person, when bound to see to application of property in.....	2244	406
<b>FOR BENEFIT OF THIRD PERSON:</b>		
defined.....	2250	407
how created.....	2251	407
when Court is trustor under.....	2252	407
how declared.....	2253	407
ib.....	2254	407
obligations of trustee under (see TRUSTEE).		
termination of.....	2279	410
not revocable.....	2280	410
See TRUSTS IN REAL PROPERTY.		
<b>TRUSTEE:</b>		
on dissolution of corporations.....	400	92
ib.....	401	92
powers of such.....	402	92
of power, effect of death of.....	936	196
defined.....	2213	402
what constitutes.....	2219	403
trust, how created as to.....	2222	403
involuntary, wrongful holder of thing is.....	2223	403
involuntary, fraudulent gainer of thing is.....	2224	404
must act in best faith.....	2228	404
not to use property for his own funds.....	2229	404
must not take advantage of beneficiary.....	2231	405
must not take part in transaction adverse to beneficiary.....	2230	404
must not assume trust adverse to interest of beneficiary.....	2232	405
must disclose adverse interest to beneficiary.....	2233	405
when guilty of fraud.....	2234	405
mixing funds with his own, how far liable.....	2236	405
presumption against.....	2235	405
measure of liability of, for breach of trust.....	2237	406
ib.....	2238	406
responsible for acts of co-trustee, when.....	2239	406
when person acquiring trust property becomes.....	2250	407
payment to, when sufficient.....	2244	406
when third person, when becomes involuntary.....	2243	406
assent of trustor and, creates trust.....	2251	407
appointed by Court, who is trustor of.....	2252	407
must fulfil purpose of trust.....	2258	408
must use ordinary care and diligence.....	2259	408
must procure trustworthy successor on discharge.....	2260	408
must invest trust fund, how.....	2261	408
must pay interest, when.....	2262	409
cannot enforce claim against trust fund.....	2263	409
powers of, as agent.....	2267	409
cannot act without assent of co-trustees.....	2268	409
discretionary power of, how controlled.....	2269	409
involuntary, rights of.....	2275	410
office of, how vacated.....	2281	411

# INDEX.

773

	Section.	Page.
<b>TRUSTEE: (Continued.)</b>		
how discharged.....	2282	411
how removable.....	2283	411
appointment of new.....	2287	411
survivorship of.....	2288	411
District Court, when.....	2289	412
insurance by, how made.....	2589	453
<b>OF REAL PROPERTY:</b>		
existing estate of, not divested.....	849	182
takes no estate in certain cases.....	850	183
ib.....	860	185
must execute release, when.....	850	183
whole estate vests in.....	863	185
when grant to, to be deemed absolute.....	869	186
acts of, in breach of expressed trust, void.....	870	186
estate of, when ceases.....	871	186
See TRUST; TRUSTS IN REAL PROPERTY.		
<b>TRUSTOR:</b>		
defined.....	2218	402
trust, how created as to.....	2222	403
Court, when deemed.....	2252	407
mutual consent of trustee and, necessary to create trust.....	2251	407
declaration of trust by.....	2253	407
ib.....	2254	407
declaration of trust by, must be obeyed.....	2258	408
cannot revoke trust, when.....	2280	410
See TRUST; TRUSTS IN REAL PROPERTY; TRUSTEE; BENEFICIARY.		
<b>TRUSTS IN REAL PROPERTY:</b>		
limited to those specified....	847	182
when legal estates.....	848	182
certain, unaffected.....	849	182
for simple use of another, void.....	850	183
for simple use of trustee under, must release.....	850	183
certain implied trusts not affected.....	851	183
must be in writing.....	852	183
resulting, limited.....	853	183
resulting, in favor of creditors.....	854	183
resulting, in favor of others.....	855	183
resulting, not to prejudice purchasers.....	856	184
express, for what purposes allowed.....	857	184
devise creating, when deemed only a power.....	858	184
when liable to creditors.....	859	184
when no estate vests under.....	860	185
vest whole estate in trustees.....	863	185
author of, may prescribe to whom estate shall belong.....	864	185
estate of grantee subject to.....	865	185
estate left in author of.....	866	186
powers over, of beneficiaries.....	867	186
ib.....	868	186
effect of omitting to declare in conveyance.....	869	186
expressed in creation of estate, acts in breach of, void.....	870	186
when to cease.....	871	186
<b>U</b>		
<b>UNCERTAINTY:</b>		
how interpreted in a contract.....	1649	325
to whom imputed.....	1654	326
See INTERPRETATION.		

	Section.	Page.
<b>UNDUE INFLUENCE :</b>		
will procured by, void.....	1272	261
contract obtained through, voidable.....	1567	311
ib.....	1689	331
defined.....	1575	313
thing gained by, held in trust.....	2224	404
presumption of, against trustee.....	2235	405
<b>UNIFORM :</b>		
interpretation to be.....	1635	323
<b>UNLAWFUL :</b>		
condition in instrument renders it void.....	709	162
condition in obligation void.....	1442	292
alternative in contract, effect of.....	1451	293
object of contract avoids it, when.....	1598	317
contracts (see <b>CONTRACTS</b> ).		
transfers (see <b>TRANSFERS</b> ).		
<b>UNRECORDED INSTRUMENTS :</b> See <b>INSTRUMENTS ; RECORDING</b> .		
<b>UNSOUND MIND :</b> See <b>PERSON OF UNSOUND MIND</b> .		
<b>USAGE :</b>		
defined.....	3577	606
meaning of words fixed by, to be followed .....	1644	325
employé to conform to.....	1982	372
agent may delegate authority when according to.....	2349	420
<b>USE :</b>		
of State land granted to corporations.....	366	86
ib.....	367	86
ib.....	368	86
of thing deposited, forbidden.....	1835	353
of thing deposited, liability of depositary for wrongful.....	1836	353
of thing hired .....	1930	364
loan for (see <b>LOAN</b> ).		
<b>USES AND TRUSTS :</b> See <b>TRUSTS IN REAL PROPERTY</b> .		
<b>USUAL :</b> See <b>USAGE ; CUSTOMARY</b> .		
<b>V</b>		
<b>VALUE :</b>		
defined.....	3579	606
rights of purchaser for.....	856	184
ib.....	869	186
ib.....	1759	343
ib.....	915	193
ib.....	1123	232
ib.....	1364	276
rights of encumbrancer for (see <b>ENCUMBRANCE</b> ).		
purchaser for, defined.....	1200	246
in assessing damages (see <b>DAMAGES</b> ).		
<b>VEHICLES :</b>		
carrier must provide safe .....	2101	387
carrier must not overload .....	2102	387
ib.....	2185	398
common carrier must provide a sufficient number of.....	2184	397
carrier must carry luggage in same vehicle with passengers...	2183	397
See <b>CARRIER</b> .		



# INDEX.

775

	Section.	Page.
<b>VENDOR:</b>		
lien of.....	3050	518
ib.....	3046	518
when deemed to waive lien.....	3047	518
extent of lien of.....	3048	518
<b>VESSEL: See SHIP.</b>		
<b>VESTED INTEREST:</b>		
defined.....	694	161
<b>VIGILANT:</b>		
preference given to the .....	1172	239
<b>VOLUNTARY DEPOSIT: See DEPOSIT.</b>		
<b>VOLUNTARY TRANSFER: See TRANSFER; GIFT.</b>		
<b>VOYAGE:</b>		
owner of ship for, liable for repairs and supplies.....	965	201
power of shipmaster during.....	2037	379
ib.....	2038	379
ib.....	2039	379
ib.....	2040	380
insured, how determined.....	2692	465
deviation from, defined.....	2693	465
deviation from, when proper.....	2695	466
deviation from, when improper.....	2696	466
deviation from, effect of, on insurance.....	2697	466
See SHIP.		
<b>W</b>		
<b>WAGES:</b>		
of minor, when may be paid to him. ....	212	46
of seamen, when begin.....	2055	382
of seamen, depend on freightage, when .....	2054	382
of seamen, depend on freightage, when not.....	2058	382
of seamen, when voyage is broken up. ....	2056	382
of seamen, when wrongfully discharged, etc .....	2057	382
of seamen, when prevented from rendering service .....	2060	383
of seamen, when personal representatives entitled to.....	2062	383
of seamen, not to be lost by special agreement.....	2052	381
of seamen, lien for.....	3064	521
<b>WAGON ROAD CORPORATIONS:</b>		
may be formed.....	286	61
articles of incorporation must state what additional facts.....	291	65
prerequisites to filing articles of incorporation.....	292	65
three Commissioners to act with surveyors.....	512	121
survey and map to be filed and approved by Supervisors.....	513	121
tolls, etc., to be collected.....	514	122
penalty for taking unlawful toll .....	514	122
no toll to be charged on public highways.....	515	122
rates of toll to be posted over gate.....	516	122
toll-gatherer may detain person until toll paid.....	517	122
toll-gatherer not to detain person unnecessarily.....	518	122
penalty for avoiding tolls.....	519	123
penalty for trespass on property of.....	520	123
when capital is repaid, tolls to be reduced.....	521	123
may mortgage and hypothecate property.....	522	123
<b>WAIVER:</b>		
of private rights allowed.....	9	3
of objections to offer of performance.....	1501	301

	Section.	Page.
<b>WAIVER: (Continued.)</b>		
of option as to delivery of goods .....	1756	343
of communication in insurance .....	2568	450
of notice of sale of pledged property .....	3003	512
of demand by pledgee or debtor .....	3004	512
of presentment and notice .....	3159	536
of protest .....	3160	536
of provisions of this Code by stipulation between parties .....	3268	549
<b>WALL:</b>		
rights of using, as party wall, an easement .....	801	176
<b>WAR:</b>		
dissolves partnership, when .....	2450	432
<b>WARD:</b>		
defined .....	235	50
rules for awarding custody of .....	246	51
release of guardian by .....	256	53
<b>WAREHOUSEMAN: See STORAGE.</b>		
<b>WARRANTEES:</b>		
lineal and collateral, abolished .....	1127	232
<b>WARRANTY:</b>		
covenant of, runs with the land .....	1463	295
covenant of, executory contract binds seller to insert .....	1734	339
defined .....	1763	344
none implied in sale, except .....	1764	344
of title to personal property .....	1765	344
on sale by sample .....	1766	344
where buyer relies on seller's judgment .....	1767	344
by manufacturer .....	1768	345
ib. ....	1769	345
ib. ....	1770	345
of goods inaccessible to buyer .....	1771	345
of trade marks .....	1772	346
of other marks on goods .....	1773	346
as to sale of written instrument .....	1774	346
of provisions for domestic use .....	1775	346
as to sale of good will .....	1776	347
on judicial sale .....	1777	347
effect of general .....	1778	347
right of buyer to inspect goods on sale with .....	1785	347
right of buyer to rescind in case of breach of .....	1786	347
implied, of money exchanged .....	1807	350
implied, in authority to agent to sell personal property .....	2323	417
of authority .....	2342	419
agent has power to give .....	2323	417
auctioneer has power to give .....	2363	422
implied in negotiable instrument .....	3116	527
damages for breach of, of quality of personal property .....	3323	562
damages for breach of, of title to personal property .....	3322	562
damages for breach of, of agent's authority .....	3328	563
<b>IN INSURANCE:</b>		
may be express or implied .....	2603	455
no form necessary to constitute .....	2604	455
when express, must be in policy .....	2605	455
may relate to past, present and future .....	2606	455
express, defined .....	2607	455
as to future, defined .....	2608	455
fulfilment of, when excused .....	2609	455
violation of material, avoids policy .....	2610	455

# INDEX.

777

	Section.	Page.
<b>WARRANTY : (Continued.)</b>		
violation of immaterial, does not prejudice.....	2611	456
violation of, without fraud, effect of.....	2612	456
may be qualified by representation, when.....	2575	451
<i>Marine :</i>		
implied, of seaworthiness.....	2681	464
implied, when complied with.....	2682	464
ib.....	2682	464
implied, to what extends.....	2684	464
implied, as to different parts of voyage.....	2685	464
implied, delay in repairing, breach of.....	2686	465
express, of neutrality, etc., effect of.....	2688	465
<b>WATER :</b>		
right of taking, an easement.....	801	176
right of receiving and discharging on land, an easement.....	801	176
right of owners as regards.....	817	179
natural flow of, not to be prevented.....	817	179
boundaries by.....	830	180
<b>WATER AND CANAL CORPORATIONS :</b>		
may be formed.....	286	61
articles of incorporation to state what additional facts.....	291	65
prerequisites to filing articles of incorporation.....	292	65
may obtain contract to supply city or town.....	548	127
duties of.....	549	127
rates to be fixed by Commissioners.....	549	127
right of way.....	550	128
to build and keep bridges in repair.....	551	128
<b>WAYS :</b>		
boundaries by.....	831	181
what title to, passes by transfer of land bounded by.....	1125	232
See RIGHT OF WAY.		
<b>WEAKNESS OF MIND :</b>		
unfair advantage taken of, renders contract voidable.....	1567	311
ib.....	1575	313
<b>WESTERLY :</b>		
defined.....	1074	221
<b>WHARF CORPORATIONS: See BRIDGE CORPORATIONS.</b>		
<b>WIDOW :</b>		
legacy to, when chargeable with debts of testator.....	1361	276
interest on legacy to, when accrues.....	1369	277
See WIFE ; SUCCESSION.		
<b>WIFE :</b>		
abduction of, forbidden.....	48	13
must abide by husband's reasonable selection of residence.....	104	27
on refusal so to do she commits desertion.....	104	27
if place is unfit and she refuses, husband commits desertion.....	105	27
neglect of husband to provide for, is ground for divorce.....	106	27
may be granted alimony on divorce.....	136	35
ib.....	137	35
ib.....	139	35
when allowance may be withheld from.....	142	35
when shall support husband out of her property.....	144	36
legitimacy of issue, where divorce granted for adultery of.....	146	36
separate property of.....	162	38

	Section.	Page.
<b>WIFE:</b> ( <i>Continued.</i> )		
inventory of separate property of.....	171	39
effect of failing to enter personal property of, in inventory....	173	39
earnings of, not liable for debts of husband.....	174	40
earnings of, when living separate, separate property.....	175	40
husband not liable for debts of, contracted before marriage....	176	40
not liable for debts of husband.....	177	40
property of, liable for her own debts.....	177	40
not allowed estate in dower.....	179	41
support of.....	181	41
husband not liable for her support if she abandons him.....	182	41
power of, as sole trader.....	188	42
husband not bound to support children of, by former marriage	209	45
consent of, necessary for husband to adopt child.....	223	47
must join husband in disposing of homestead.....	1240	253
disposition of common property in case of death of.....	1396	283
duress or menace of, avoids contract of husband, when.....	1569	312
ib.....	1570	312
See MARRIAGE; DIVORCE; MARRIED WOMAN; HUSBAND AND WIFE.		
<b>WILL:</b>		
when person of unsound mind may make.....	34	9
future interest may pass by.....	699	161
power to dispose of property by, how executed.....	901	191
power to dispose of property, when cannot be executed by....	902	191
power in trust created by, how executed.....	937	196
liability of persons acquiring property by.....	1127	232
effect of, upon gift.....	1152	235
who may make.....	1270	260
insane person incompetent to make.....	1271	261
procured by fraud, etc., may be denied probate.....	1272	261
revocation of, obtained by fraud, etc., void.....	1272	261
married woman may dispose of her separate property by.....	1273	261
what may pass by.....	1274	261
who may take by.....	1275	261
written, how executed.....	1276	261
witness to, must state residence.....	1277	262
conjoint or mutual.....	1278	262
competency of subscribing witness to.....	1279	262
conditional.....	1280	262
gift by, to subscribing witness, when void.....	1281	262
creditors competent witnesses to.....	1281	262
witness to, when entitled to devise by.....	1282	262
made in other State, valid.....	1283	263
void, unless duly executed.....	1284	263
subsequent change of domicile does not affect.....	1285	263
effect of codicil on.....	1286	263
power to devise, how executed by terms of.....	1330	271
includes codicils.....	1376	277
execution and construction of prior, not affected by the Code.	1375	277
mortgage on property devised by, how satisfied.....	2940	501
child born after making of, takes certain share....	1305	267
children unprovided for by, when may succeed.....	1306	267
share of child born after making of, out of what portion taken	1307	267
death of devisee before testator.....	1309	263
ib.....	1343	272
ib.....	1344	273
devises of land in, how construed.....	1310	268
subsequently acquired title passes by.....	1311	268
change of interest by, does not affect insurance.....	2556	448
<i>Interpretation of:</i>		
according to intention.....	1317	269
to be confined to written will.....	1318	269

	Section.	Page.
<b>WILL: (Continued.)</b>		
rules of, to be observed.....	1319	270
several, to be taken together.....	1320	270
all parts to be considered in.....	1321	270
latter part controls.....	1321	270
distinct clause not affected by indistinct.....	1322	270
in case of ambiguity or doubt.....	1323	270
words to be taken in ordinary sense.....	1324	270
words to receive operative construction.....	1325	270
technical words.....	1327	270
technical words not necessary.....	1328	271
to avoid intestacy.....	1326	270
of devise, etc., of real property, etc.....	1331	271
of devise of residue of real property.....	1332	271
of devise, as referring to time of death.....	1333	271
of devise or bequest to a class.....	1337	271
of words of donation and limitation.....	1335	271
of directions for conversion.....	1338	272
by what law governed.....	1377	277
<b>Revocation of:</b>		
procured by fraud may be annulled.....	1272	261
of mutual will may be effected.....	1278	262
made in other State, valid.....	1283	263
void unless duly executed.....	1284	263
subsequent change of domicile does not affect.....	1285	263
of written will.....	1291	264
evidence of.....	1292	265
by obliteration.....	1298	265
of duplicate.....	1294	265
by subsequent will.....	1295	265
subsequent, does not revive prior will.....	1296	265
by marriage and birth of issue.....	1297	266
by marriage of testator.....	1298	266
by marriage of testatrix.....	1299	266
contract to sell property disposed of by will, is not.....	1300	266
encumbrance on property disposed of by will, is not.....	1301	266
conveyance, when is.....	1303	266
conveyance, when is not.....	1302	266
revokes codicils.....	1304	267
provisions relating to, apply to what wills.....	1374	277
<b>NUNCUPATIVE:</b>		
how executed.....	1287	263
requisites to make valid.....	1288	263
proof of.....	1289	264
probate of.....	1290	264
need not be in writing.....	1276	261
<b>WITNESS:</b>		
testimony of, when privileged.....	47	13
name of, to marriage ceremony, to be indorsed on certificate....	73	20
not necessary to validity of real instruments.....	1098	225
recording of instruments proved by other than subscribing....	1163	237
oath of credible, necessary in taking acknowledgments.....	1174	240
interpreter may be employed for foreign.....	1182	242
subscribing, to be personally known to officer taking proof....	1184	242
subscribing, shall prove, what.....	1185	242
subscribing, handwriting of, when may be proved.....	1187	243
subscribing, evidence of, to prove, what.....	1188	244
to will necessary.....	1288	263
ib.....	1276	261
to will, duties of.....	1277	262
to will, cannot take under will.....	1281	262
to will, when may take as much under will as by succession..	1282	262
See EVIDENCE.		

	Section.	Page.
<b>WORDS:</b>		
<i>Interpretation of:</i>		
doubtful.....	1068	220
ib.....	1654	326
to be taken in ordinary sense.....	1644	325
ib.....	1324	270
technical, not necessary in will.....	1328	271
to receive operative construction in will.....	1325	270
technical, how construed.....	1327	270
ib.....	1645	325
to be given some meaning if possible.....	1326	270
in will, to what time refer.....	1336	272
of donation and limitation in will.....	1335	271
how used in the Code.....	8556	603
See DEFINITIONS; INTERPRETATIONS.		
<b>WORDS OF INHERITANCE:</b>		
not necessary to pass a fee.....	1329	271
ib.....	1076	221
construction of.....	1075	221
<b>WRECK:</b> See SHIPWRECK.		
<b>WRITING:</b>		
consent to apprenticeship, to be in.....	266	55
trusts in real property must be in.....	852	183
execution of power to be by instrument in.....	899	191
ownership of private communications in.....	991	209
transfer may be made without, when.....	1051	217
transfer in, called grant.....	1052	218
transfer of real property must be in.....	1091	223
instruments in, prima facie import consideration.....	1096	225
transfer of what personal property to be in.....	1135	233
will in, how executed.....	1276	261
nuncupative will need not be in.....	1287	263
non-negotiable instrument in, transferable.....	1459	294
debtor, on payment of debt, entitled to receipt in.....	1499	301
debtor may be released by release in.....	1541	307
what contracts must be in.....	1624	321
contract prevented by fraud from being put in, may be enforced, when.....	1623	321
supersedes oral negotiations concerning contract.....	1625	322
contract in, takes effect, when.....	1626	322
contract in, how far disregarded, when erroneous.....	1640	324
intention of parties, when ascertained from.....	1639	324
in contract controls printed parts.....	1651	326
contract in, how altered.....	1698	332
authority of agent to execute executory real instrument to be in.....	1733	339
implied warranty on sale of executory instrument in.....	1774	346
carrier's obligations not altered except by agreement in.....	2174	396
guaranty, when must be.....	2793	479
real mortgage must be in.....	2937	500
power of attorney to execute personal mortgage, must be in.....	2959	504
<b>WRONG:</b>		
he who consents, suffers no.....	3515	596
no one can take advantage of his own.....	3517	596
remedy for every.....	3523	597
law does not interpose between parties equally in.....	3524	597
<b>WRONGS:</b>		
minors and persons of unsound mind liable for.....	35	10
damages for.....		564

	Section.	Page.
<b>Y</b>		
<b>YEAR :</b>		
defined .....	1917	362
ib.....	3581	607

## NOTE.

There are two modes of indexing:

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28







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